SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 11

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian, PETITIONER,

vs.

MANUFACTURERS TRUST COMPANY.

No. 15

MANUFACTURERS TRUST COMPANY, PETITIONER,

vs.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

1 In United States Circuit Court of Appeals
For the Second Circuit

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,
PETITIONER-APPELLEE,

against

MANUFACTURERS TRUST COMPANY,
RESPONDENT-APPELLANT.

Statement Under Rule 15(b)

This is an appeal from an order of the United States District Court for the Southern District of New York made pursuant to Section 17 of the Trading with the Enemy Act, as amended (40 Stat. 425, 50 U. S. C. App. Sec. 17). Respondent, Tom C. Clark, Attorney General of the United States, as successor to the Alien Property Custodian, instituted the proceeding by the service upon Manufacturers Trust Company, the appellant, on October 31, 1947, of a petition and order to show cause dated October 29, 1947 requiring appellant to show cause why an order should not be made directing appellant to comply with Vesting Order No. 5791 of the Alien Property Custodian and the demands based thereon.

The motion came on to be heard before Judge Alfred C. Coxe on November 7, 1947 and was then adjourned to and came on to be heard on November 13, 1947. Appellant's answer to petition was filed on November 13, 1947. On December 12, 1947 an order was made and entered directing appellant to pay to respondent the sum of $26,963.29. On the 30th day of December, 1947 an appeal was taken by the filing with the Clerk of the United
2 States District Court for the Southern District of New York of a notice of appeal dated December 29, 1947 as well as of a bond for costs.

There has been no change in the parties; Manufacturers Trust Company was not arrested or bail taken, its property was not attached or arrested; no question was referred to a Commissioner or Commissioners, Master or Referee.

In United States District Court
Southern District of New York

C 1043-755

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,
PETITIONER,
v.
MANUFACTURERS TRUST COMPANY,
RESPONDENT.

Order to Show Cause

Upon the annexed petition of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, by his attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, sworn to on the 29th day of October, 1947, and the exhibits annexed thereto, and good cause appearing therefor, it is

ORDERED that the Respondent herein, Manufacturers Trust Company, show cause at a motion term of this
3 Court to be held in Room 506, United States Court House, Foley Square, Borough of Manhattan, City of New York, at 10:30 A. M. on the 7th day of November, 1947, or as soon thereafter as counsel may be heard, why an order should not be made and entered herein ordering and directing the respondent to comply with Vesting Order No. 5791 of the Alien Property Custodian, and the demands based thereon, and for such other and further relief as the Court may deem just, together with the costs and disbursements of this proceeding.

Service of a copy of this order upon the respondent, or an officer or an agent thereof, together with copies of the papers upon which it is based, on or before November 3rd, 1947, shall be deemed sufficient.

Dated: New York, N. Y., October 29, 1947.

EDWARD A. CONGER,
U. S. D. J.

4 In United States District Court

Petition

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian, by his attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, prays for an order to show cause

against the above-named respondent and for an order for the relief hereinafter requested, on the following grounds:

1. Jurisdiction is invoked under the provisions of Section 17 of the Trading with the Enemy Act, as amended (40 Stat. 425, 50 U. S. C. App. Sec. 17).

2. On information and belief, the respondent, Manufacturers Trust Company, is and has been at all times material hereto a corporation organized and existing under the laws of the State of New York and having it principal place of business in the City of New York, within this District.

3. The respondent reported to the Government, on October 31, 1941, that it had a balance of $39,339 in the account of the Reichsbank Direktorium, Berlin, Germany, as of June 14, 1941 (Exhibit A).

4. By Vesting Order No. 5791, issued February 1, 1946 (11 F. R. 3005), the Alien Property Custodian vested a certain debt or obligation owing to the Reichsbank Direktorium by the respondent (Exhibit B).

5. The respondent acknowledged service of the Vesting Order on April 8, 1946, and advised the Alien Property Custodian that a balance, in the sum of $25,581.49, stood to the credit of the Deutsche Reichsbank account as of that date (Exhibit C).

6. By Executive Order No. 9788 (11 R. R. 11981), on October 15, 1946, all authority, rights, privileges, powers, duties and functions vested in the Office of Alien Property Custodian and in the Alien Property Custodian were vested, transferred and delegated to the Attorney General, and all property or interests vested in or transferred to the Alien Property Custodian or seized by him were transferred to the Attorney General.

7. The petitioner issued a turn-over directive to the respondent on January 24, 1947, requiring it to turn over to him the sum of $25,581.49, due and owing to the Deutsche Reichsbank by the respondent, together with all accumulations and increments (Exhibit D).

8. The respondent acknowledged service of the turn-over directive on January 30, 1947 (Exhibit E).

9. The respondent, Manufacturers Trust Company, has refused and still refuses to comply with said Vesting Order No. 5791 (Exhibit B) and the turn-over directive (Exhibit D) requiring the respondent to deliver to the petitioner the sum of $25,581.49 (Exhibit F), and the demand made as heretofore set forth that the respondent de-

liver to the petitioner as successor to the Alien Property Custodian the sum of $25,581.49, together with all accumulations and increments thereto since February 1, 1946.

10. No previous application has been made for the relief herein requested.

WHEREFORE, the petitioner prays that an order issue requiring the respondent, Manufacturers Trust Company, to show cause why it should not be directed to comply forthwith with the aforesaid Vesting Order No. 5791, and the demands made pursuant thereto, and that an order issue ordering and directing the said Manufacturers Trust Company to comply forthwith with the aforesaid Vesting Order No. 5791 and the demands made pursuant thereto, and that petitioner receive the costs and disbursements of this proceeding.

Dated: New York, N. Y., October 29th, 1947.

JOHN F. X. McGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Petitioner,

By: LAURENCE H. AXMAN,
LAURENCE H. AXMAN,
Assistant United States Attorney,
Office & Post Office Address,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

(Verified October 20, 1947.)

Exhibit "A", Annexed to Petition

REPORT FROM TFR—300 SERIES E: To be Used by Banks, Only to Report Deposit Accounts, Collection Items, Cashier's and Certified Checks, Bank Acceptances, and Letters of Credit (Instruction 2).

BEFORE PREPARING THIS REPORT READ CAREFULLY THE INSTRUCTIONS IN SECTIONS I, II, III, AND VIII OF PUBLIC CIRCULAR No. 4

Nationality.—The person concerning whose property report is being made is a national of the following country or countries (Instruction 4): Germany

Number F D 1457
Instruction 15 (*a*)

TO THE SECRETARY OF THE TREASURY:

The undersigned, pursuant to the Regulations of April 10,1940, as amended, issued under Executive Order No. 8389, as amended, hereby makes the following report:

PART A: NAME OF THE NATIONAL WHOSE PROPERTY IS REPORTED.

Name Reichsbank Direktorium

Last known address (Standstill Account #1) Berlin . Germany

(Business, profession, or occupation) Bank (Citizen of or organized under the laws of) Germany

8 PART C, SCHEDULE I: PROPERTY TYPES. (Instruction 6).

Type Number	Property type	Amount in U. S. dollars of property held on opening of business on June 14, 1941 (a)	June 1, 1940 (b)
1.	Demand deposits (3)	$39,339.—	$387,812.—
2.	Time or savings deposits (4)	0	0
3.	Collection items (not reported under deposits)	250.—	0
	TOTAL OF TYPES 1 TO 3	$39,589.—	$387,812.—
4.	Cashier's and certified checks issued or certified by reporting bank (12)	0	Not
5.	Acceptances by reporting bank (12)	0	Readily
6.	Letters of credit (12)	0	Available
	TOTAL OF TYPES 1 TO 6	$29,589.—	$387,812.—

PART C, SCHEDULE II: PROPERTY ITEMS, (1) Demand Deposits (Instruction 7).

	Name of Account	Balance as of June 14, 1941	June 1, 1940
1.	Vostro: Standstill A/C #1	0	$387,812.—
2.	Vostro: Devisen Abt.	$39,339.—	0
	TOTAL	$39,339.—	$387,812.—

9 PART C, SCHEDULE II: PROPERTY ITEMS, (3) Collection Items (Instruction 9).

	Description of Item (Instruction 9)	Date When Payable	Amount Payable June 14, 1941	June 1, 1940
1.	Check Elsie B. Kilvert on Manufacturers Trust Co.	Sight	$250.—	Not Readily Available
	TOTAL		$250.—	

PART D: ADDITIONAL INFORMATION CONCERNING PROPERTY ITEMS. (Instruction 13.)

1. State the name, nationality, and address of any person, other than the national, having any interest in any property listed above of any nature whatsoever, direct or indirect, including any arising under powers of attorney and any other powers or rights to deal with the property or arising under any agreement restricting the national's use of the property, and describe the nature and amount of such interest.

Dep. in Obeyance	Amer. Chem. Paint	$20,000.—
" " "	Dime Savings Bank	12,000.—
" " "	Chemical Bank & Trust Co.	12,000.—

2. Describe any adverse or other claims, including any legal actions or proceedings whatsoever, asserted or existing against or with respect to any property listed above, stating the names, addresses, and nationalities of the adverse or other claimants and all relevant facts regarding the nature and origin of the claim, including the exact titles of legal actions or proceedings, and the courts where they were brought. none

3. State the name, address, and nationality of any guarantor of any deposit account listed above, and give the terms of the guarantee. none.

4. State any other facts known to the bank reporting bearing on the nature or ownership of any property listed above. none

PART E: ADDITIONAL INFORMATION CONCERNING NATIONAL (Instruction 14.)

1. State the national's citizenship and address on January 1, 1939, and on June 1, 1940, if different, respectively, from the citizenship or address in Part A. unknown

2. If the person concerning whose property this report is being made is a national of a foreign country by reason of any fact other than that such person has been a subject or citizen of a foreign country, state the facts determining his nationality as defined in Section 5E of Executive Order No. 8389, as amended. unknown

3. State whether or not you maintained a credit file on the national. yes

4. State the total indebtedness of the national to you, (a) on June 1, 1940 none (b) on June 14, 1941. none

5. State the name, number, if any, and amount of any debit account of the national, existing on either or both June 1, 1940, and June 14, 1941, indicate the date, and

state the name, address, and nationality of any guarantor of any such account, giving a brief summary of the terms of the guarantee. 5/31/40 Overdraft-Vostro $15.—

THIS REPORT IS COVERED BY THE GENERAL AFFIDAVIT

11 *Exhibit "B", Annexed to Petition*

UNITED STATES OF AMERICA
OFFICE OF ALIEN PROPERTY CUSTODIAN

VESTING ORDER NUMBER 5791

Re: Bank account owned by Deutsche Reichsbank

Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding:

1. That Deutsche Reichsbank, the last known address of which is Berlin, C 111, Germany, is a national of a designated enemy country (Germany);
2. That the property described as follows:

   That certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same,

   is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national of a designated enemy country;

And determining that to the extent that such national is a person not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany);

12 And having made all determinations and taken all action required by law, including appropriate consultation and certification, and deeming it necessary in the national interest,

HEREBY VESTS in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in an appropriate account or accounts, pend-

ing further determination of the Alien Property Custodian. This Order shall not be deemed to constitute an admission by the Alien Property Custodian of the lawfulness of, or acquiescence in, or licensing of, any set-offs, charges or deductions, nor shall it be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall it be deemed to indicate that compensation will not be paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this Order may, within one year from the date hereof, or within such further time as may be allowed, file with the Alien Property Custodian on Form APC-1 a notice of claim, together with a request for a hearing thereon. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

The terms "national" and "designated enemy
13 country" as used herein shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Executed at Washington, D. C., on February 1, 1946.

(Signed) JAMES E. MARKHAM
James E. Markham
Alien Property Custodian

(Official Seal)

I hereby certify that the within is a true and correct copy of the original paper on file in this office.

For the Attorney General
DONALD C. COOK, Director
Office of Alien Property
Department of Justice.
By LOYOLA M. BLANTON
Acting Assistant Secretary for Records

Exhibit "C", Annexed to Petition

MANUFACTURERS TRUST COMPANY
Fifty-Five Broad Street
New York 15, N. Y.

April 8, 1946

Re: Deutsche Reichsbank

F-28-1282 E-8

Alien Property Custodian
Washington, D. C.

Dear Sir:

We acknowledge receipt of your letter dated March 19, 1946 and Vesting Order number 5791 therein enclosed.

In and by the terms of said order, the Alien Prop-
14 erty Custodian purports to vest in himself that cer-
tain bank account with the Manufacturers Trust Company which is due and owing to the Deutsche Reichsbank in the sum of $25,581.49.

As we previously advised your representative, a balance in the sum of $25,581.49 stood to the credit of the Deutsche Reichsbank account with us as of the date of the Vesting Order but on said date, and for some time prior thereto, the Deutsche Reichsbank was indebted to this institution in a sum far in excess of said balance on an obligation in a sum far in excess of said balance on an obligation which has long been past due.

In view of the foregoing, there is no credit balance available to the Deutsche Reichsbank.

Yours very truly,

BERTRAM E. DRISCOLL
Bertram E. Driscoll
Assistant Secretary

Exhibit "D", Annexed to Petition

OFFICE OF ALIEN PROPERTY
DEPARTMENT OF JUSTICE
Washington, D. C.

TURNOVER DIRECTIVE

Re: Property of Deutsche Reichsbank
Vesting Order 5791 (11 Fed. Reg. 3005, March 21, 1946)

To: Manufacturers Trust Company,
55 Broad Street, New York 15, New York

Under the authority of the Trading with the Enemy Act, as amended, and Executive Order 9193, as amended,

and pursuant to law, the following described property was vested in the Alien Property Custodian by Vesting Order 5791, dated February 1, 1946 (a copy of which is attached hereto and by reference made a part hereof):

"That certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same;"

and the aforesaid property was transferred to the Attorney General of the United States by Executive Order 9788.

NOW, THEREFORE, by virtue of the authority above set forth,

IT IS HEREBY FOUND AND DETERMINED that:

1. At the time of issuance of said vesting order there was due and owing by you to the said Deutsche Reichsbank a debt or obligation in the sum of $25,581.49 arising out of the aforementioned dollar account.

2. There are no valid offsets or counterclaims to said sum of $25,581.49.

3. The sum of $25,581.49 is property which is now in your possession or under your control that was vested in the Alien Property Custodian by Vesting Order 5791 and transferred to the Attorney General of the United States by Executive Order 9788; and

IT IS HEREBY REQUIRED that the property described above, together with all accumulations to and increments thereon, shall forthwith be turned over to the undersigned to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Your attention is invited to Section 5(b)(2) of the Trading with the Enemy Act, as amended, which provides that

"Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in

respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

Executed at Washington, D. C. on January 24th, 1947.

For the Attorney General

DONALD C. COOK, Director
Office of Alien Property

17 *Exhibit "E", Annexed to Petition*

RETURN OF SERVICE ON TURNOVER DIRECTIVE

I, FRANCIS A. MACFARLANE an authorized representative of the Office of Alien Property, do hereby certify that on this January 30th, 1947, I served personally on Albert E. Christie, Assistant Secretary of the Manufacturers Trust Company, 55 Broad Street, New York, N. Y., a Turnover Directive, (with certified copy of Vesting Order No. 5791 attached hereto) executed January 24, 1947 for the Attorney General of the United States by Donald C. Cook, Director, Office of Alien Property, directing the turnover of the sum of $25,581.49, together with all accumulations and increments thereon, owing to Deutsche Reichsbank by Manufacturers Trust Co., 55 Broad Street, New York, N. Y., arising out of a dollar account entitled Reichsbank Direktorium Divisen Abteilung, vested in the Alien Property Custodian by Vesting Order No. 5791. A true and correct copy of the aforesaid Turnover Directive is hereto attached and made part hereof.

FRANCIS A. MACFARLANE

RECEIPT

I, ALBERT E. CHRISTIE, Assistant Secretary of the Manufacturers Trust Co., 55 Broad Street, New York, N. Y., do hereby acknowledge receipt of the above-described Turnover Directive with certified copy of Vesting Order No. 5791 attached thereto.

A. E. CHRISTIE
1/30/47

18 *Exhibit "F," Annexed to Petition*

MANUFACTURERS TRUST COMPANY
Fifty-Five Broad Street
New York 15, N. Y.

February 6, 1947

Mr. Donald C. Cooke, Director
Office of Alien Property,
Washington, D. C.

Re: Bank Account owned by Deutsche Reichsbank,
Vesting Order No. 5791

Dear Mr. Cooke:

On January 30, 1947 there was served upon the Manufacturers Trust Company a Turnover Directive in connection with the above captioned account and vesting order.

We wish to advise that these documents have been referred to our counsel: Newman & Bisco, 29 Broadway, New York City, who will communicate with you in the near future.

Yours very truly,

BERTRAM E. DRISCOLL.
BERTRAM E. DRISCOLL
Asst. Secretary

19 In the United States District Court

Answer to Petition

Manufacturers Trust Company, answering the petition of Tom C. Clark, Attorney General, dated October 29, 1947, respectfully shows and alleges:

1. That at all times hereinafter mentioned Manufacturers Trust Company was, and still is, a corporation organized and existing under the banking laws of the State of New York.

2. That Deutsche Reichsbank was a depositor of Manufacturers Trust Company and maintained several accounts with it.

3. That Manufacturers Trust Company was served with Vesting Order No. 5791, dated February 1, 1946, a photostatic copy of which, marked "Exhibit B", is annexed to the petition, wherein and whereby the Alien Property Custodian purported to vest "That certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Devisen Abteilung, and any and all rights to demand, enforce and collect the same."

4. Thereafter, on January 24, 1947, the Attorney General, as successor to the Alien Property Custodian, issued a turnover directive which contained a determination that at the time of the issuance of the Vesting Order No. 5791, there was due and owing from Manufacturers Trust Company to Deutsche Reichsbank the sum of $25,581.49, and that there are no offsets or counterclaims thereto, and directed Manufacturers Trust Company to turn said sum over to the Attorney General.

20 5. The Attorney General is now applying to this Court under Section 17 of the Trading With The Enemy Act for an order directing Manufacturers Trust Company to pay to him the sum of $25,581.49 upon the ground that by Vesting Order No. 5791, the Alien Property Custodian vested the said balance as a debt due from Manufacturers Trust Company to Deutsche Reichsbank.

6. Manufacturers Trust Company denies that by issuing Vesting Order No. 5791, the Alien Property Custodian vested $25,581.49 as a debt owing from Manufacturers Trust Company to Deutsche Reichsbank for the following reasons:

Vesting Order No. 5791 does not specify that Manufacturers Trust Company is indebted to Deutsche Reichsbank in the sum of $25,581.49 and does not contain any determination to that effect. The Attorney General is now asking for an order upon the ground that by the issuance of Vesting Order No. 5791, the Alien Property Custodian vested the $25,581.49 as a sum due and owing from Manufacturers Trust Company to Deutsche Reichsbank. Section 7e of the Trading With The Enemy Act provides that the President may require that any property owing or belonging to or held for, by or on account of an enemy, which the President after investigation, shall determine is so legally belonging, may be seized by the Alien Property Custodian. Since such seizure is accomplished by the issuance of a Vesting Order, it is essential that the determination which is the basis for the Vesting Order be made and the property vested be specifically described in the Vesting Order itself.

7. Furthermore, by a vesting order the Alien Property Custodian can only vest property or a debt which was in existence at the time of the issuance of the Vest-

21 ing Order. Manufacturers Trust Company did not hold any property for or on behalf of the Deutsche Reichsbank. The relationship between Manufacturers Trust Company as a depository and the Deutsche Reichsbank as a depositor of Manufacturers Trust Company is a

debtor and creditor relationship. The existence of a debt from Manufacturers Trust Company to the Deutsche Reichsbank can not be predicated upon the status of a particular account. Manufacturers Trust Company can not be a debtor of the Deutsche Reichsbank unless the total of their mutual credits exceeds the total of their mutual debits. At the time of the issuance of the Vesting Order No. 5791, Deutsche Reichsbank's indebtedness to Manufacturers Trust Company was in excess of $25,581.49 and therefore there was no debt owing from Manufacturers Trust Company to Deutsche Reichsbank arising out of the Reichsbank Direktorium Divisen Abeilung account. The indebtedness of the Deutsche Reichsbank arose from the fact that Deutsche Reichsbank was upon information and belief, an instrumentality and part of the German Government. The German Government guaranteed to Manufacturers Trust Company the payment of debts of various German Banks to Manufacturers Trust Company. On June 1st, 1940 and June 14th, 1941, the indebtedness of the said banks to Manufacturers Trust Company, was in excess of $25,581.49.

8. In addition to the foregoing, Manufacturers Trust Company is advised by counsel that a lien of a bank on a depositor's balance for the amount of depositor's indebtedness to the bank is well recognized by law. Manufacturers Trust Company is further advised by counsel that Section 8 of the Trading with the Enemy Act recognizes the lien of any person who is not an enemy or an ally of an enemy and the lienor's right to realize thereon in satisfaction of the lienor's claims.

22 WHEREFORE, MANUFACTURERS TRUST COMPANY respectfully prays that the petition of Tom C. Clark, Attorney General, for an order directing Manufacturers Trust Company to pay him the sum of $25,581.49, be denied.

Dated: New York, N. Y., November 12, 1947.

MANUFACTURERS TRUST COMPANY,
By HAROLD H. KAUFMAN.
NEWMAN & BISCO,
By SYDNEY R. NEWMAN,
A member of the firm,
Attorneys for Respondent,
Office and P. O. Address,
29 Broadway,
Borough of Manhattan,
City of New York.

(Verified November 13, 1947.)

23 In United States District Court

Order Appealed From

This proceeding coming on to be heard upon the petition of Tom C. Clark, Attorney General of the United States, as successor to the Alien Property Custodian of the United States, and the exhibits annexed thereto, and an order to show cause dated October 30, 1947 and upon the service duly made upon the respondent, Manufacturers Trust Company, pursuant to the said order to show cause; upon the entry of appearance by Newman & Bisco, Esqs., for the respondent; upon the answer of Newman & Bisco, attorneys for the respondent, and the court having heard Michael L. Looney, Chief Trial Attorney, Department of Justice, of counsel for the petitioner, in support of the petition, and Henry Landau, of Newman & Bisco, attorneys for respondent in opposition thereto and the matter having been duly considered,

Now Therefore, upon the petition and exhibits annexed thereto and the order to show cause and entry of appearance on behalf of respondent, Manufacturers Trust Company, upon the answer filed in behalf of said respondent and upon all of the proceedings heretofore had herein, it is

Ordered, that the said Manufacturers Trust Company be and hereby is directed to pay over to Tom C. Clark, Attorney General of the United States as successor to the Alien Property Custodian, the sum of $25,581.49, plus interest at the rate of 6% per annum from January 30, 1947, amounting to $1354.68 plus costs as taxed in the sum of $27.12 amounting in all to $26,963.29.

Dated: New York, N. Y., December 12th, 1947.

Alfred C. Coxe,
U. S. D. J.

24 In United States District Court

(Title Omitted)

Notice of Appeal

Notice is Hereby Given that Manufacturers Trust Company, respondent above named, hereby appeals to the Circuit Court of Appeals of the Second Circuit from the order directing Manufacturers Trust Company to pay to Tom C. Clark, Attorney General of the United States, as successors to the Alien Property Custodian, the sum of

$26,963.29 entered in this proceeding on the 12th day of December, 1947.

NEWMAN & BISCO,
By SYDNEY R. NEWMAN,
A Member of the Firm,
Attorneys for Appellant,
Office and P. O. Address,
29 Broadway,
Borough of Manhattan,
City of New York.

Dated: December 29, 1947.

To:
Clerk of the United States District Court,
Southern District of New York.
JOHN F. X. MCGOHEY, ESQ.,
United States Attorney,
Attorney for Respondent,
U. S. Courthouse,
Foley Square,
New York, N. Y.

In United States District Court

(Title Omitted)

Appellant's designation of contents of record on appeal

Sirs:

Respondent-appellant designates the following portions of the record and proceeding to be contained in the record on appeal in this proceeding:

1. The order to show cause made by Judge Edward A. Conger on October 29, 1947 and petition of Tom C. Clark, Attorney General, dated October 9, 1947, and exhibits attached thereto.
2. Answer of Manufacturers Trust Company verified November 12, 1947.
3. The order of Judge Alfred C. Coxe dated December 12, 1947.
4. Notice of Appeal.
5. This designation.

Dated: New York, December 29, 1947.

Yours, etc.,

NEWMAN & BISCO,
Attorneys for Respondent-Appellant.
Office and P. O. Address,
29 Broadway,
Borough of Manhattan,
City of New York.

To:
JOHN F. X. MCGOHEY, ESQ.,
United States Attorney,
Attorney for Petitioner-Respondent,
U. S. Courthouse,
Foley Square,
New York, N. Y.

27 In United States District Court

(Title Omitted)

Stipulation as to record

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated: New York, January 27th, 1948.

NEWMAN & BISCO,
Attorneys for Respondent-Appellant.

JOHN F. X. MCGOHEY,
United States Attorney for the Southern District of New York,
Attorney for Petitioner-Appellee.

28 Clerk's Certificate to foregoing transcript omitted in printing.

29 In United States Circuit Court of Appeals
for the Second Circuit

No. 216—October Term, 1947

(Argued April 14, 1948. Decided August 5, 1948)

Docket No. 20924

TOM C. CLARK, Attorney General of the United States, as successor to the Alien Property Custodian,
PETITIONER-APPELLEE,

v.

MANUFACTURERS TRUST COMPANY,
RESPONDENT-APPELLANT.

Before SWAN, CLARK and FRANK, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Petition by the Attorney General of the United States, as successor to the Alien Property Custodian, brought

under § 17 of the Trading with the Enemy Act, 50 U.S.C.A. App. § 17, against Manufacturers Trust Company. From an order directing the respondent to pay to the petitioner the sum of $25,581.49 with interest thereon at 6% per annum from January 30, 1947, plus costs, amounting in all to $26,963.29, the respondent appeals. Order modified.

NEWMAN & BISCO, Attorneys for appellant; LEONARD G. BISCO and HENRY LANDAU, of counsel.

DAVID L. BAZELON, Assistant Attorney General, JOHN F. X. MCGOHEY, United States Attorney for the Southern District of New York, MAX ISENBERGH, Special Assistant to the Attorney General, and JOSEPH W. BISHOP, JR., Attorney, Department of Justice, for appellee.

Opinion

SWAN, Circuit Judge:

This is an appeal by Manufacturers Trust Company, for brevity hereafter called the Bank, from an order entered in a proceeding brought under § 17 of the Trading with the Enemy Act, 50 U.S.C.A. App. § 17, to compel payment to the Attorney General of a debt of $25,581.49 alleged to be owed by the Bank to Deutsche Reichsbank, a German national. The proceeding was commenced in October 1947 by an order to show cause and a petition which alleged the existence of the debt, the issuance by the Alien Property Custodian of a vesting order and a turn-over directive, and the Bank's refusal to comply therewith.[1]

The Bank's answer denied the existence of the alleged debt because the Deutsche Reichsbank was indebted to the Bank in a sum in excess of $25,581.49. The answer also asserted that the Bank's right to apply the depositor's balance against the depositor's indebtedness amounted to a possessory lien within section 8 of the Act, 50 U.S.C.A. App. § 8. Upon the pleadings and the exhibits attached thereto, the court entered the order before us on appeal. It directs the Bank to pay the Custodian the sum of $25,581.49 with interest thereon at 6% per annum from January 30, 1947, plus costs. No opinion was written by the district judge.

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[1] By Executive Order No. 9788 of October 14, 1946, 11 F. R. 11981, the Attorney General succeeded to the rights, powers and duties of the Alien Property Custodian. In this opinion the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General as his successor without discriminating between them.

From the pleadings and attached exhibits the following facts appear: In October 1941 the Bank reported to the Secretary of the Treasury that as of June 14, 1941 a demand deposit of some $39,000 stood to the credit of Reichsbank Direktorium, of Berlin, Germany, and that the Reichsbank was not indebted to it. On February 1, 1946, the Custodian issued Vesting Order No. 5791 which described the property thereby vested as "That certain debt or other obligation owing to Deutsche Reichsbank by Manufacturers Trust Company, 55 Broad Street, New York, N. Y., arising out of a dollar account entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same." Vesting Order No. 5791 found that Deutsche Reichsbank was a German national but made no determination as to the amount of the debt owing to it. By letter dated April 8, 1946 the Bank acknowledged receipt of the Vesting Order, admitted that a balance of $25,581.49 (stood to the credit of the Deutsche Reichsbank account with us as of the date of the Vesting Order" but asserted that no credit balance is available because on that date the Deutsche Reichsbank was indebted to it in a sum far in excess of said balance on an obligation which had long been past due. The nature of that obligation is set forth in the Bank's answer which alleges that the indebtedness of the Deutsche Reichsbank arose from the fact that it was, "upon information and belief," an instrumentality and part of the German Government; that the German Government guaranteed to the Bank the payment of debts of various German banks and that their indebtedness to the Bank on June 14, 1941 was in excess of $25,581.49. By a Turnover Directive which was served on the Bank on January 30, 1947, the Custodian determined that at the time of the issuance of Vesting Order 5791 the Bank owed Deutsche Reichsbank $25,581.49; that "there are no valid offsets or counterclaims to said sum," that said sum is property which
31 "is now" in the Bank's possession or control that was vested in the Custodian; and the Custodian made demand that such property be forthwith turned over to him. After the Bank refused to comply, the present proceeding was instituted on October 29, 1947.

This appeal presents several interesting questions upon which there is surprisingly little direct authority. A suit under § 17 of the Act is a summary proceeding to compel delivery of possession of enemy-owned property which has

been effectively seized by a valid vesting order. The appellant concedes, as it must, that a debtor must pay to the Custodian an acknowledged debt regardless of any controversy as to who is the creditor. *American Exchange National Bank v. Garvan*, 273 F. 43 (C.C.A. 2), aff'd sub nom. *Simon v. American Exchange National Bank*, 260 U. S. 706. This imposes no hardship since the debtor is protected by § 7(e) from pursuit by any other person. But when the existence of the debt is denied, the appellant contends that requiring it to be paid before judicial determination of the dispute, in effect permits the Custodian to *create* the debt by his ex parte determination and to seize property of the putative debtor which is not owed to the enemy or to anyone else. The consequences of giving the Custodian such a power are exceedingly drastic; the alleged debtor may have to sell property in order to obtain the money necessary to make the payment, and the loss so sustained is not remediable by a suit under § 9 for its return.

Section 7(c) provides that "If the President shall so require any money * * * owing * * * to * * * an enemy * * * which the President after investigation shall determine is so owing * * * shall be * * * paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * * " Despite the breadth of this language Judge Learned Hand was of opinion that it "must be confined to debts whose validity and existence the debtor acknowledges," and supported his view with [illegible] cogent reasons. *Simon v. Miller*, 298 F. 520 (S.D.N.Y.). In opposition to this interpretation, the Custodian relies on *Camp v. Miller*, 286 F. 525 (C.C.A. 5) and *Clark v. E. J. Lavino & Co.*, 72 F. Supp. 497 (E.D. Pa.). In the *Camp* case the maker of a $15,000 note resisted the Custodian's demand for payment upon the ground that the enemy-owner of the note had agreed that it was to be paid off in German marks, and therefore a lesser sum was due than the Custodian claimed. But the court held that the sum demanded must be paid and the debtor must seek relief under § 9 of the Act. In the *Lavino* case, the debtor admitted that $25,000 was owed to an enemy but claimed the right to set off an unliquidated claim for loss of cargo. The court held that in a suit under § 17, the set-off could not be asserted, and relegated Lavino to a suit under § 9. The result, the appellant concedes, was right because the

32 debts were not "mutual," as required in set-off, but the court's reasoning is disagreed with by the appellant, as is also the decision in *Camp v. Miller, supra.*

If the putative debtor denies the existence of any debt whatever, we should hesitate to hold that the Custodian's power extends so far as to make his ex parte determination that there is a debt and the amount of it conclusive in a proceeding under § 17. To so hold would mean that the Custodian can by his own ex parte action call property into existence for purposes of seizure. But the question in that bald form is not before us for decision. Here the Bank acknowledges that it became indebted to the Deutsche Reichsbank in the sum of $25,581.49, but asserts a right of set-off arising out of independent transactions between itself and the German Government. Its right of set-off, if any, depends upon an allegation upon "information and belief" that the Reichsbank "was an instrumentality and part of the German Government." Thus the issue tendered is not as to the existence of the debt demanded by the Custodian, but whether an independent claim may be used as a set-off. It is argued that by New York law applicable to the settlement of mutual accounts, between a bank and its depositor, the bank's obligation is reduced to the extent of the set-off so that only the remaining balance is the actual debt owing. It is true that there are cases containing language to this effect. Thus, in *Long Beach Trust Co. v. Warshaw*, 264 N. Y. 331, 334, the opinion states: "It is only the balance which is the real or just sum owing by or to the insolvent."[2] This language is appropriate to the cases where it was used but would seem to have little bearing on the question now before us. At common law a defendant was not allowed to set up any cross claim against a plaintiff by way of set-off or counterclaim. A restricted right of set-off was developed in equity and finally by statute set-off was allowed in all cases. Technically, a set-off at law is a money demand independent of and unconnected with the plaintiff's cause of action. *Otto v. Lincoln Savings Bank*, 268 App. Div. 400, 402, aff'd 294 N. Y. 798. Hence the assertion by the Bank of a right of set-off is not a denial of the Reichsbank's claim for the amount of its deposit. Consequently, we believe that, in harmony with the principle that an admitted debt owed to an enemy must be paid over,

[2] See also *Gersela Corp. v. Equitable Trust Co.*, 241 N. Y. 418, 424; *Kress v. Central Trust Co.*, 246 App. Div. 76, 79, aff'd. 272 N. Y. 629.

the Custodian was entitled to recovery and the Bank must have recourse to § 9 to litigate its asserted right of set-off.[3]

33 The appellant further contends that under section 8 of the Act[4] it has a possessory lien on the credit balance of its depositor, the Reichsbank, which it is entitled to retain against the Custodian. The Custodian argues that section 8(a) was designed not to protect lienors from the temporary dispossession to which all holders of enemy owned property are subject, but to ensure that an American holder of a possessory lien might, in a suit under § 9, recover not merely the value of his equity in the property, but actual possession of the whole of the property.[5] But the correctness of the Custodian's argument in this respect need not be decided. In our opinion the Bank's right of set-off is not a "lien or other right in the nature of security in property of an enemy," within the meaning of the statutory language. Although sometimes referred to as a "banker's lien," the right of set-off is not technically a lien,[6] and certainly not a lien in property of an enemy, for the deposit of money in a bank passes title to the money and creates the ordinary debtor-creditor relationship. A credi-

[3] We do not think this conclusion is necessarily inconsistent with *Simon v. Miller*, 298 F. 520 (S. D. N. Y.). From the statement of facts it appears that Simon "had had financial dealings with a German subject, one Albert, which had not then, and never have, been stated between them." It is possible that the transactions were so related that neither party would become indebted to the other without an accounting. If so, the situation there considered by Judge Learned Hand did not involve a set-off of claims arising from independent transaction, as in the case at bar.

[4] Sec. 8(a): "Any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, * * * may continue to hold said property, and, after default, may dispose of the property in accordance with law * * * *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; * * * *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order."

[5] See H. Rep. No. 85, 65th Cong. 1st Sess. p. 3; S. Rep. No. 113, 65th Cong. 1st Sess. p. 8.

[6] See 38 Harv. L. Rev. 800.

tor has no possessory lien on the general assets of his debtor. The reference in § 8 to "property * * * which, by law or by the terms of the instrument * * *, may be disposed of on notice or presentation or demand," makes it quite plain, we think, that the security interests protected are those in specific property which may have been hypothecated by pledge, mortgage, etc., or otherwise subjected to a possessory lien, but does not cover property constituting the general assets of a debtor against which the enemy asserts only a claim as a creditor.

34 The appellant's final contention is that the court erred in allowing interest from January 30, 1947, the date of service of the turn-over directive. The Trading with the Enemy Act contains no provision for the payment of interest or any other penalty in the event of noncompliance with the Custodian's demand that enemy-owned property be turned over to him. The summary procedure provided by § 17 enables the Custodian, without delay if he immediately invokes it, to obtain an order directing compliance. Such an order directing payment of the sum demanded will doubtless bear interest under the general statutes dealing with interest on judgments. But we see no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment. No authority allowing it has been called to our attention. The cases relied upon by the appellee involve taxes or advances where the right to the money was finally adjudicated. Here the only right adjudicated is the right to hold possession; if the Bank shall succeed in a § 9 suit in establishing its claim of set-off the Custodian will have to return what he collects. A majority of the court believes there was an error in allowing interest amounting to $1354.68. Judge Clark, however, believes that, since the defendant took upon itself the decision to detain the money without legal right, and had the use thereof during the period of detention, the usual rule of interest on illegally withheld payments should apply.

The order is modified by striking out this interest item and in other respects is affirmed. No appellate costs are awarded.

* * * * *

Opinion

FRANK, Circuit Judge, concurring in the result:

I think we should hold no more than this: Assuming, arguendo, that an unequivocal claim by appellant of mutual debts would have called for reversal, we affirm because appellant's answer made no such claim; it merely alleged "upon information and belief" (1) that the Reichsbank was an instrumentality and part of the German government, and (2) that that government owed appellant an amount in excess of the amount of the Reichsbank's deposit; as against the custodian such an allegation is insufficient in an action like this.

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Opinion

CLARK, Circuit Judge, dissents as to the modification for denial of interest and concurs as to the remainder of the opinion.

35 In United States Circuit Court of Appeals,
Second Circuit

Present: Hon. Thomas W. Swan, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

TOM C. CLARK, Attorney General, Etc.,
PETITIONER-APPELLEE,

v.

MANUFACTURERS TRUST CO.,
RESPONDENT-APPELLANT.

Appeal from the District Court of the United States for the Southern District of New York

Judgment—filed Aug. 5, 1948

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is modified by striking out a certain interest item, but affirmed in other respects in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

By A. DANIEL FUSARO,
Deputy Clerk.

(File endorsement omitted)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] Supreme Court of the United States,

October Term, 1949

No. 15

MANUFACTURERS TRUST COMPANY, PETITIONER,

v.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 3, 1948, providing the statutory time has not already expired.

ROBERT H. JACKSON,
Associate Justice of the Supreme Court of the United States.

Dated this 5th day of November, 1948.

(9709)

Supreme Court of the United States

No. 11—October Term, 1949.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

Order Allowing Certiorari—Filed June 27, 1949.

ON CONSIDERATION of the motion for leave to file a petition for rehearing and of the petition for rehearing in this case,

IT IS ORDERED by this Court that the motion for leave to file and the petition for rehearing, be, and they are hereby, granted. The order entered January 17, 1949, denying certiorari is vacated and the petition for writ of certiorari is granted.

AND IT IS FURTHER ORDERED that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 15—October Term, 1949.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Order Allowing Certiorari—Filed June 27, 1949.

On Consideration of the motion for leave to file a petition for rehearing and of the petition for rehearing in this case,

It Is Ordered by this Court that the motion for leave to file and the petition for rehearing, be, and they are hereby, granted. The order entered January 17, 1949, denying certiorari is vacated and the petition for writ of certiorari is granted.

And It Is Further Ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

MANUFACTURERS TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian,[1] prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (R. 29) has not yet been reported.

[1] By Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this petition the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 5, 1948 (R. 35). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTION PRESENTED

Whether, in a proceeding by the Alien Property Custodian under Section 17 of the Trading with the Enemy Act to enforce a demand for a sum of money vested as the property of an enemy, the District Court may allow interest on such sum from the date of the demand.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 15–19.

STATEMENT

On January 30, 1947 the Alien Property Custodian, having previously vested the debt owing by the respondent to a named German enemy (Vesting Order No. 5791, February 1, 1946, 11 F. R. 3005), issued a turnover directive in which he found the amount of the debt to be $25,581.49, and directed the respondent to turn over that amount (R. 11, 14). The respondent refused to comply, and on October 29, 1947, the Custodian

instituted the present proceeding under Section 17 of the Trading with the Enemy Act, 40 Stat. 425, 50 U. S. C. App. 17, to enforce compliance with the turnover directive (R. 4). On December 12, 1947, the District Court for the Southern District of New York (Coxe, J.) directed the respondent to pay over the sum demanded, together with interest at the rate of 6% from the date of service of the turnover directive (R. 23). The Court of Appeals for the Second Circuit affirmed the order of the District Court insofar as it directed compliance with the turnover directive, but a majority of the court (Swan and Frank, JJ.) held that the Custodian was entitled to interest only from the date on which the District Court entered its order (R. 34). The majority based its decision on the ground that "the Trading with the Enemy Act contains no provision for the payment of interest or any other penalty in the event of non-compliance with the Custodian's demand that enemy-owned property be turned over to him" and that there was "no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment" (R. 34). Judge Clark dissented on the ground that "since the defendant took upon itself the decision to detain the money without legal right, and had the use thereof during the period of detention, the usual rule of interest on illegally withheld payments should apply" (R. 34).

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals for the Second Circuit erred:

1. In holding that, when the Alien Property Custodian determined that a sum of money was owing to an enemy and demanded that such sum be paid over, a district court in which he brought suit to enforce his demand could not award interest at a reasonable rate from the date of the Custodian's demand;

2. In modifying the order of the District Court to strike out the award of interest.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals on the interest question is in conflict with the principles which this Court has established to govern the award of interest in the absence of express Congressional provision therefor.

As both courts below held, the respondent was obligated to pay over the sum demanded immediately upon receipt of the turnover directive (R. 23, 29). See also *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 566, 558–9; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 53, 55–6; *Silesian-American Corp.* v. *Clark,* 332 U. S. 469, 475–477. The respondent, therefore, unreasonably detained a sum of money which the Trading with the Enemy Act obligated him to pay forthwith upon the Custodian's demand.

The principal and perhaps the only ground of the majority opinion in the Court of Appeals appears to have been that the statute contains no express declaration of a congressional intent that the Custodian should recover interest as compensation for delay in compliance with this demand. But decisions of this Court, old and recent, have made it clear that little, if any, significance is to be given legislative silence in this respect. In numerous cases this Court and lower federal courts have awarded interest on obligations created by federal law, despite the absence of any statutory provision for such interest. Such interest has been awarded not as a penalty, but for the reasons on which Judge Clark based his dissent here: to indemnify the United States for the wrongful witholding of money which it was entitled to possess and use, and to avoid the unjust enrichment of the person who wrongfully retained and used the money. *E. g.*, *Billings* v. *United States*, 232 U. S. 261; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Maryland Casualty Co.* v. *United States*, 76 F. 2d 626 (C. C. A. 5). The principles followed by this Court were concisely stated in its recent opinion in *Rodgers* v. *United States*, 332 U. S. 371, 373:

> * * * the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose

> that the obligation shall not bear interest. * * * For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. * * *
>
> As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained. * * *

Thus, since a fine is imposed in a criminal case as a punishment or deterrent rather than for the financial advantage of the United States, criminal penalties do not bear interest. *Pierce* v. *United States*, 255 U. S. 398, 405–406. The *Rodgers* case, *supra*, applied this principle to penalties imposed on noncooperators under the Agricultural Adjustment Act. On the other hand, failure to pay a tax when due is held to entitle the United

States to interest. *E. g., Billings* v. *United States, supra.* Similarly, interest has been awarded in a suit to recover the amount of advance payments from the surety of a defaulting contractor, and in a suit to recover the value of lands with which the United States was induced to part through the defendant's fraud. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512; *Jones* v. *United States*, 258 U. S. 40.

If these standards are applied to the obligation to pay over money which the Custodian demands, pursuant to the Trading with the Enemy Act, it seems plain that the Government is equitably entitled to interest. The obligation to turn over such sums on demand is not, of course, imposed as a fine or penalty of any description. The statute creates the obligation, not only to keep the property from being used for the benefit of the enemy but also to "affirmatively compel the use and application of foreign property" in "the interest of and for the benefit of the United States." H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2–3; 55 Stat. 839, 50 U. S. C. App. 5 (b) (1). Indeed, the most recent amendment of the Act shows that this must be regarded as a major purpose of the statute, for it provides in substance that vested German and Japanese property shall not be returned to its former owners nor compensation paid to them, but that the net proceeds of such property shall be covered into the

Treasury. P. L. 896, 80th Cong., 2d Sess., July 3, 1948, § 12.[2] The obligation which the present suit was brought to enforce must, therefore, be regarded as one imposed for the "financial advantage" of the United States, within the rule stated in the *Rodgers* case.

The Court of Appeals sought to distinguish the *Billings* case and other cases cited above (*supra* p. 5) on the ground that they "involve taxes or advances where the right to the money was finally adjudicated" (R. 34). This distinction has no substance. In the tax cases[3] as in this, Congress has decided that the public interest requires that the Government's receipt of money be not subject to the delay inherent in judicial proceedings—in other words, that the Government is entitled to possess and use the money in the period between its demand and final adjudication of the lawfulness of the exaction.[4]

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[2] For lucid exposition of the considerations underlying this legislative policy, see Rubin, "*Inviolability*" *of Enemy Private Property* (1945) 11 Law and Contemporary Problems 166.

[3] The right of the Government to collect its internal revenue by summary administrative proceedings has long been settled. *Phillips* v. *Commissioner*, 283 U. S. 589, 595. The Trading with the Enemy Act is, in fact, only one of a number of statutes which empower the Government to insist upon compliance with its orders prior to judicial review of their lawfulness. See *Yakus* v. *United States*, 321 U. S. 414, 442–3, and cases cited.

[4] The Trading with the Enemy Act expressly provides that the Custodian may "seize" property which he determines to be owned by or owed to an enemy. 40 Stat. 418, as amended,

See *Salamandra Ins. Co.* v. *New York Life Ins. & Trust Co.*, 254 Fed. 852, 860–861 (S. D. N. Y.).

Thus, in the tax cases as in this, the possibility that the Government may, after full adjudication, be held not entitled to keep the sums collected can affect neither the Government's right to possess and use such sums in the interim period, nor its corollary right to be compensated for deprivation of that right. *Maryland Casualty Co.* v. *United States, supra,* is particularly apposite. There the Government brought an action on a bond to secure payment of a tax deficiency, the condition of the bond being the taxpayer's payment of the "deficiency in the tax found due by the Commissioner." The surety defended the suit on the ground that the tax was not legally owing and had, in fact, been determined in bankruptcy proceedings not to be owing. The court recognized that the taxpayer might "after paying seek refund of anything he did not owe" or that the surety might, after paying, be so subrogated to the taxpayer's rights as to be entitled to ask refund of any unlawful exaction. 76 F. 2d at p. 627. But the court treated the ultimate correctness of the Commissioner's determination as immaterial to the right

50 U. S. C. App. 7 (c). Courts have recognized that the Custodian could, if so inclined, take with the strong hand. See *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 568–9; Hough J., concurring in *American Exchange National Bank* v. *Garvan*, 273 Fed. 43, 48 (C. C. A. 2), affirmed, 260 U. S. 706.

of the United States to interest as compensation for the unjust withholding of money which the United States was entitled at least temporarily to possess and use. "The object of the bond was to assure prompt payment * * * of the taxes claimed by the Commissioner; not then to start a lawsuit about them." *Ibid.* The court assessed interest against the surety, at the legal rate, from the date of notice and demand upon it. There is no reason to suppose that the result would have been different if the taxpayer had not, by posting bond, transferred his responsibility to the surety, for the taxpayer's statutory obligation to pay would have been quite as absolute as the surety's contractual obligation.

2. The precise question has arisen in but one other Circuit. In *Clark* v. *E. J. Lavino & Co.*, the District Court for the Eastern District of Pennsylvania, in circumstances substantially similar to those of the present case, awarded interest to the Government in its original order but on rehearing entered a decree which allowed no interest. The original opinion of the court (72 F. Supp. 497) did not discuss the question of interest, and the court filed no opinion in connection with its decree on rehearing. The Government has taken an appeal to the Court of Appeals for the Third Circuit, but the case has not yet been calendared for argument.[5]

[5] In *Clark* v. *Central Savings Bank* (S. D. N. Y., Civil No. 43–753, unreported) a proceeding substantially similar to

3. The decision of the Court of Appeals will substantially hamper the exercise by the Custodian of the powers which Congress has conferred on him.

As in the tax procedure, a principal purpose of the summary procedure which Congress has authorized to be employed in the "swift, certain and final reduction to possession of vast quantities of property involved in incredible complication of ownership and interest"[6] is the prevention of recalcitrance and litigation designed simply to postpone as long as possible the loss of the use of such property. Consequently, judicial enforcement, under Section 17 of the Act, of the Custodian's demand should, as Mr. Justice Holmes declared, be not "less immediately effective than a taking with the strong hand." *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 568. In practice it can be so effective only if delay in compliance is rendered unprofitable by the award of interest. The statement by the court below that the Custodian can, under Section 17, obtain an order directing compliance "without delay" (R. 34) is not accurate. In the instant case some seven weeks elapsed between the filing of the

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the present one, the District Court, in an order enforcing the Custodian's directive, entered on December 19, 1947, failed to award interest. The court wrote no opinion. The Government filed notice of appeal, but prosecution of the appeal has been postponed pending the outcome of the instant case.

[6] Judge Learned Hand in *Kahn* v. *Garvan*, 263 Fed. 909, 916–7 (S. D. N. Y.).

Custodian's petition and the entry of the District Court's order. The generally crowded state of federal dockets makes it doubtful whether this time could be much shortened in other jurisdictions. In fact, in the *Lavino* case, *supra* p. 10, 8½ months elapsed between the filing of the Custodian's petition and the first order of the District Court. Moreover, the administrative burden of the Custodian is greatly increased if he must litigate every demand for possession. In brief, the purpose of Congress to preclude dilatory tactics on the part of holders of enemy property can be fully effectuated only if such tactics are made unprofitable; and they are not unprofitable if the recalcitrant is not required to pay a fair rate of interest for the period during which, without legal right, he detains the property. Congress assuredly did not create the summary procedure for obtaining property with the intention that flouting of that procedure should result in the enrichment (through use of the property involved) of the person flouting it. See *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 568–9.

4. The question is of large practical importance in the administration of the Trading with the Enemy Act.

Turnover directives have been and are being issued by the Office of Alien Property with increasing frequency, particularly in connection with its program for vesting cash, including bank deposits and other indebtednesses to enemies.

See *Annual Report, Office of Alien Property, Department of Justice, Fiscal Year ending June 30, 1947*, p. 96. They may involve sums of money far greater than that here concerned. For example, one such directive, recently issued, involved a sum in excess of half a million dollars; another, which has not yet been complied with, approximately $150,000. The great majority of holders of enemy property who have received such directives have complied promptly, but a severe strain is placed upon the will to cooperate in the Government's program if the reward of non-cooperation is the interest-free use of a substantial sum of money for a period of several weeks or months, while the Custodian is obtaining judicial enforcement of his order. It is not as if such litigation could serve any useful purpose. The Custodian's suit under Section 17 is purely possessory, and settles nothing as to the correctness of his determination and his ultimate right to retain the property; any such question must in any event be litigated in a separate proceeding under Section 9 of the Act. See, *e. g., Central Trust Co. v. Garvan, supra,* at pp. 566, 568–9; *Kahn v. Garvan,* 263 Fed. 909, 914, 916–7 (S. D. N. Y.). But the tendency of the decision of the court below, if allowed to stand, will inevitably be to encourage this fruitless litigation and thereby to increase the administrative burden of the Custodian; to entangle in incidental litigations the Custodian's exercise of his power sum-

marily to reduce enemy property to possession; and to deprive the Government of the possession and benefit of substantial sums of money for substantial periods of time.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839]:

* * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or in-

terest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020]:

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or

the same may be seized by the Alien Property Custodian; * * *

* * * * * *

SEC. 9. (a) [as amended by the Act of March 4, 1925, c. 285, Sec. 1, 42 Stat. 1511] That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the

claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 17. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may

be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary"

* * * * *

SEC. 39 (as added by Pub. L. No. 896, 80th Cong., 2d Sess., July 3, 1948):

No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

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OCTOBER TERM, 1949

No. 11

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

MANUFACTURERS TRUST COMPANY

No. 15

MANUFACTURERS TRUST COMPANY, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER IN NO. 11 AND FOR THE RESPONDENT IN NO. 15

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (R. 17-24) is reported at 169 F. 2d 932. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 5, 1948 (R. 24). Cross-petitions for writ of certiorari were filed by the Solicitor General, on behalf of the Alien Property Custodian,[1] on October 29, 1948, and by Manufacturers Trust Company[2] on December 2, 1948. Both petitions were denied on January 17, 1949. The Solicitor General, on behalf of the Custodian, filed a petition for rehearing on June 16, 1949. In a memorandum filed June 22, 1949, the Bank asked that, if the Government's petition for certiorari. On June 27, 1949, both petitions for rehearing should be granted, rehearing be granted also of the denial of the Bank 's petition for writ of rehearing were granted, the orders denying certiorari were vacated, and certiorari was granted in both cases.

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

Section 7(c) of the Trading With the Enemy Act provides that if the President shall "so require any money * * * owing * * * to * * * an

[1] By Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

[2] Manufacturers Trust Company will sometimes be referred to in this brief as "the Bank."

enemy * * * which the President after investigation shall determine is so owing * * * shall be * * * paid over to the Alien Property Custodian * * *." The Custodian, to whom the President's powers thereunder have been delegated, has after investigation determined that a bank is indebted to an enemy in a stated amount, has demanded payment to himself of that amount, and has instituted suit to enforce his demand. The Bank's refusal to comply with the demand is based on its assertion of a right of setoff against the enemy creditor. The following questions are presented:

1. Whether, in a summary proceeding to enforce the Custodian's demand for payment of a debt found to be owing to an enemy, the debtor may put in issue the correctness of the Custodian's findings by denying the existence of the debt.

2. Whether the rights conferred by Section 8(a) of the Act on holders of certain types of security interests may be asserted in such a summary proceeding, and, if so, whether the interest here claimed comes within the scope of that section.

3. Whether the District Court properly allowed interest on the sum demanded from the date of service of the demand.

STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 44-47.

STATEMENT

On October 31, 1941, Manufacturers Trust Company reported to the Treasury Department that, as of June 14, 1941, the Deutsche Reichsbank had a total credit of $39,589.00 (R. 5).[3] The Bank further reported that the Reichsbank was not indebted to it in any amount on either June 1, 1940, or June 14, 1941, and that there were no adverse claims asserted against or with respect to the indebtedness in question (R. 6).

By Vesting Order No. 5791, dated February 1, 1946 (11 F. R. 3005), the Custodian, having determined that the Deutsche Reichsbank was a national of an enemy country and that "that certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company" was "property within the United States * * * payable or deliverable to" the Reichsbank, vested such property in himself (R. 7-8). On January 30, 1947 the Custodian issued a turnover directive in which he found the amount of the debt to be $25,581.49, that there were no valid offsets or counterclaims, and that the sum of $25,581.49 was property in the possession of or under the control of the respond-

[3] By Treasury Department Regulation, dated June 14, 1941, as amended September 18, 1941 (6 F. R. 2905, 4818), issued pursuant to Section 5(b) of the Trading With the Enemy Act as amended by the Joint Resolution of May 7, 1940 (54 Stat. 179, 50 U.S.C. App. § 5(b)), reports were required to be made to the Treasury Department of all property subject to the jurisdiction of the United States on June 1, 1940, and June 14, 1941, in which on the respective dates any foreign country or national thereof had an interest. 31 C.F.R. (Cum. Supp. 1943) § 130.4.

ent which was vested in the Custodian by Vesting Order No. 5791.[4] He accordingly directed the Bank to turn over that amount (R. 9-11). The Bank refused to comply, and on October 29, 1947, the Custodian instituted this proceeding to enforce compliance with his demand (R. 2-4). On December 12, 1947, the District Court for the Southern District of New York (Coxe, J.) directed the Bank to pay over the sum demanded, together with interest at the rate of 6% from the date of service of the turnover directive (R. 15). On appeal by the Bank the Court of Appeals for the Second Circuit unanimously affirmed the order of the District Court insofar as it directed compliance with the turnover directive, but a majority of the Court (Swan and Frank, JJ.) held that the Custodian was entitled to interest only from the date on which the District Court entered its order (R. 17-24).

In No. 11 the Government has petitioned to review the decision of the Court of Appeals insofar as it reversed the decision of the District Court and denied the Custodian's claim to interest. In No. 15 the Bank has petitioned to review the decision of the Court of Appeals insofar as it affirmed the decision of the District Court and directed immediate payment to the Custodian of the principal sum demanded.

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[4] This determination was made notwithstanding previous receipt by the Custodian of a letter from the Bank asserting that the sum in question was offset by obligations of the enemy to the Bank (R. 9).

SUMMARY OF ARGUMENT

In this action the Custodian seeks summary enforcement of his demand for payment of a debt determined to be owed to an enemy. The Bank's contention that it may resist payment by denying existence of the debt is founded upon a misconception of the summary nature of this proceeding. Section 7(c) of the Act specifically provides that "any money * * * owing * * * to * * * an enemy * * *, which the President after investigation shall determine is so owing * * * shall be * * * paid over to the Alien Property Custodian * * *." Similar authority is contained in Section 5(b) of the Act which allows the vesting of "any property or interest" of an enemy; and the pertinent Treasury Department Regulations define "property," as there used, to include "bank deposits" and "any debts, indebtedness or obligations." No reasonable distinction can be drawn between the right of summary capture as to property owned by an enemy (which the Bank concedes) and the right of summary capture of money owed to an enemy (which the Bank denies). The necessity for the Custodian to be free of the burden of vexatious litigation is the same in both cases, and the hardship upon the person compelled to pay is no greater in one instance than in the other. Both classes of persons may test the correctness of the Custodian's determination of enemy interest, and hence of his right to retain the property seized, by subsequent judicial proceedings instituted pursuant to Section 9(a) of the Act.

Similarly without foundation is the Bank's argument that its claim of a "banker's lien," if established, would exempt the debt from seizure under Section 8(a) of the Act. The legislative and judicial history of Section 8(a) of the Act show that it was not intended to exempt any security holders from the Custodian's power of summary seizure, but simply to preclude any interpretation of the Act which would result in the permanent destruction of their possessory rights. In any event, however, there cannot in this case be a possessory lien of the type referred to in Section 8(a) since, upon deposit of the funds with the Bank, title passed to it and a simple debtor-creditor relationship arose between it and the enemy creditor. It is manifest that the Bank cannot have a lien "in the nature of security" against its own property.

Since the Custodian was entitled to immediate possession of the money, fairness and the efficient administration of the Trading With the Enemy Act required that he be allowed a reasonable rate of interest as damages for the unwarranted detention. On like grounds this Court has frequently held that interest is awardable on obligations owing to the Government despite the lack of any statutory provision for interest. The obligation to pay was created, in substantial part, for the financial advantage of the Government, and the Government is entitled to compensation for an unlawful withholding. To deny interest in such circumstances would make it profitable to delay payment to the Custodian as long as possible and would thus en-

courage the flouting of a statutory procedure designed to ensure the speedy reduction to possession of enemy property.

ARGUMENT

I

AN ACTION BY THE CUSTODIAN, TO ENFORCE HIS DEMAND FOR POSSESSION OF VESTED PROPERTY, IS SUMMARY AND MAY NOT BE DELAYED BY LITIGATION OF ADVERSE CLAIMS TO SUCH PROPERTY

In the administration of the Trading With the Enemy Act no principle is better settled than that the Custodian may proceed summarily to reduce to possession property which he determines to be enemy-owned. "War brooks no delay." *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 477. From the outset the courts have pointed out that the Custodian could seize by force; that "the statute creating the Custodian enables him to capture enemy property with a sergeant and file, or otherwise *vi et armis*." *American Exchange National Bank* v. *Garvan*, 273 Fed. 43, 48 (C.A. 2), affirmed 260 U. S. 706. In practice, he follows, as he did here, the more moderate course of issuing a formal demand [5] and then proceeding, where necessary, in a

[5] His demand may be cast in the form of a so-called *res* vesting order in which the Custodian determines that a described *res* is enemy property and demands the delivery of that *res* to him. See, e.g., *The Antoinetta*, 49 F. Supp. 148, 150-151 (E.D. Pa.), affirmed, 153 F. 2d 138 (C.A. 3), certiorari denied, 328 U. S. 863. Or, as here, he may, after having vested the interests of a named enemy in certain property, issue a turnover directive defining that interest and demanding its pay-

federal or state court to enforce compliance.[5] But it is settled that in such a summary proceeding the Custodian's determinations are conclusive and no questions as to the ultimate right of the Custodian to retain the property can be presented.

In the first case which came to this Court under the Trading With the Enemy Act, Mr. Justice Holmes emphatically rejected the contention that the reduction to possession of property which had been determined to be enemy-owned could be delayed by litigation as to its actual enemy status, stating that "it cannot be supposed that a resort to the Courts is to be less immediately effective than a taking with the strong hand." *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 568. The same contention was made and rejected in *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, where

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ment to him. See, e.g., *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y.S. 2d 289; *Matter of Daly*, 189 Misc. 680, 74 N.Y.S. 2d 711.

In many cases, the Custodian finds it unnecessary to avail himself of his summary powers and is content simply to issue an order vesting the right, title and interest of an enemy and to permit an adjudication of the scope of that right, title and interest prior to reduction of the property to possession. For explanation of the distinction between a *res* vesting order and a right, title and interest order, see *Clark* v. *Edmunds*, 73 F. Supp. 390 (W.D. Va.). That the Custodian does not always find it necessary to exercise his summary powers does not, of course, detract from their availability to him when needed.

[5] Suit in federal court is authorized by Section 17 of the Act. Cf. *Markham* v. *Allen*, 326 U. S. 490. Where, however, the property is in course of administration by a state court, the Custodian frequently applies to that court for enforcement of his demand. E.g., *Matter of Viscomi*, 270 App. Div. 732, 60 N.Y.S. 2d 897.

Mr. Justice McKenna pointed out that "the determination of the Custodian is conclusive whether right or wrong" (p. 53) and characterized the suit as "tantamount to physical seizure" (p. 55). And these principles have been consistently applied since, both as to seizures under Section 7(c) of the Act and as to vestings under Section 5(b).[7]

These principles were solidly founded on the plain, unambiguous language of the statute. That language deals in exactly the same manner with property which the Custodian determines to be owing to an enemy as with property determined to be owned by an enemy.

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[7] See, *e.g.*, under Section 7(c):

Stoehr v. *Wallace*, 255 U. S. 239; *American Exchange National Bank* v. *Garvan*, 273 Fed. 43 (C.A. 2), affirmed, 260 U. S. 706; *In re Miller*, 281 Fed. 764 (C.A. 2), appeal dismissed, 262 U. S. 760; *Miller* v. *Kaliwerke Aschersleben A. G.*, 283 Fed. 746 (C.A. 2); *Application of Miller*, 288 Fed. 760 (C.A. 2); *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289 (C.A. 5); *Camp* v. *Miller*, 286 Fed. 525 (C.A. 5); *Hicks* v. *Baltimore & O. R. Co.*, 10 F. 2d 606 (D. Md.), aff'd *sub nom. Baltimore & O. R. Co.* v. *Sutherland*, 18 F. 2d 560 (C.A. 4); *In re Sutherland*, 23 F. 2d 595 (C.A. 2); *Kohn* v. *Jacob & Josef Kohn*, 264 Fed. 253 (S.D.N.Y.); *Miller* v. *Rouse*, 276 Fed. 715 (S.D.N.Y.); *Miller* v. *Lautenberg*, 239 N.Y. 132, 145 N.E. 907; *Matter of Sielcken*, 167 Misc. 327, 3 N.Y.S. 2d 793.

Under Section 5(b):

Silesian-American Corporation v. *Markham*, 156 F. 2d 793 (C.A. 2), affirmed *sub nom. Silesian-American Corporation* v. *Clark*, 332 U. S. 469; *The Antoinetta*, 49 F. Supp. 148, 150-151 (E.D. Pa.), affirmed, 153 F. 2d 138 (C.A. 3), certiorari denied, 328 U. S. 863; *Clark* v. *E. J. Lavino & Co.*, 72 F. Supp. 497 (E.D. Pa.), modified in another connection, C.A. 3 (unreported, decided June 1, 1949; for decision see motion, *Clark* v. *Manufacturers Trust Co.*, App., pp. 7-14); *Matter of Viscomi*, 270 App. Div. 732, 60 N.Y.S. 2d 897; *Stern* v. *Newton*, 180 Misc. 241, 39 N.Y.S. 2d 593; *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y.S. 2d 289; *Matter of Daly*, 189 Misc. 680, 74 N.Y.S. 2d 711.

Section 7(c) of the Act (40 Stat. 416, as amended, 50 U.S.C. App. § 7(c)) provides, in pertinent part, that:

> If the President shall so require any money or other property * * * *owing or belonging to* or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy * * * *which the President after investigation shall determine is so owing or so belongs or is so held,* shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian * * *. [Italics added.][8]

By this section the Custodian is given the authority to seize property which he determines to be owing to or owned by an enemy. Its categorical language affords no possible basis for a distinction between the two types of enemy property. To sustain such a distinction would require, in effect, that the words "so owing" in the italicized phrase be transposed so as to make the phrase read "which is so owing or which the President after investigation shall determine so belongs or is so held." Neither the legislative history of the provision nor its evident purpose furnishes any excuse for such drastic textual surgery.

Even as Section 7(c) imposes no limitation upon the Custodian's power to vest and summarily re-

[8] The powers conferred on the President by this section have been delegated to the Attorney General, as successor to the Alien Property Custodian. Executive Orders Nos. 6694, dated May 1, 1934; 8136, dated May 15, 1939 (4 F.R. 2044); 9142, dated April 21, 1942 (7 F.R. 2985); 9788, dated October 14, 1946 (11 F.R. 11981).

duce to possession "any property" owned by or owing to an enemy, the language of Section 5(b) of the Act is similarly broad, allowing the vesting of "any property or interest" of a foreign country or national thereof. For purposes of that section "property" includes "bank deposits" and "any debts, indebtedness or obligations." 8 C.F.R. (1949) § 511.1(c).[9]

Accordingly, it has been held by those courts which have been confronted with the problem that the Custodian's determination of indebtedness to an enemy may not be questioned in a summary proceeding to enforce his demand for the amount which he has determined to be owing. *Camp* v. *Miller*, 286 Fed. 525 (C.A. 5); *Clark* v. *E. J. Lavino & Co.*, 72 F. Supp. 497 (E.D. Pa.), modified in another connection, C.A. 3 (unreported, decided June 1, 1949; for decision, see motion, *Clark* v. *Manufacturers Trust Co.*, App., pp. 7-14); *Miller* v. *Rouse*, 276 Fed. 715 (S.D.N.Y.); *Clark* v. *Central Savings Bank*, (S.D.N.Y., Civil No. 43-753, unreported). But see *Simon* v. *Miller*, 298 Fed. 520, 522-524 (S.D.N.Y.)[10] In *Clark* v. *E. J. Lavino & Co.*,

[9] This definition has received implicit legislative ratification. Joint Resolution of May 7, 1940, c. 185, § 1, 54 Stat. 179; First War Powers Act of 1941, c. 593, Title III, § 301, 55 Stat. 839. See also 86 Cong. Rec. 5170, April 29, 1940, where Senator Danaher read into the Congressional Record the then existing Treasury Department Regulations defining "property" in language identical to that quoted above.

[10] *Simon* v. *Miller* was a suit under section 9(a) for recovery of vested property of which the Custodian had already obtained possession. Accordingly, it constitutes no precedent as to the conclusiveness of the Custodian's determinations for purposes of a summary proceeding to enforce his demand.

supra, the court held (72 F. Supp. at p. 499), that the person whom the Custodian has found to be indebted:

> * * * may not, in the present proceeding, question the Alien Property Custodian's determination [as to the indebtedness]. If a mistake has been made by the Alien Property Custodian in his determination, respondent is not without a remedy. Section 9 of the Trading With the Enemy Act * * * provides a procedure for the recovery of property which has been erroneously seized * * *.

And in *Miller* v. *Rouse*, *supra*, Judge Learned Hand said (276 Fed. at 716):

> The respondents object that this debt * * * was an unexecuted gift. Perhaps so, but the Custodian has determined that it was a debt, and his determination is conclusive * * * this proceeding is merely to enforce the capture so made.

The Bank, however, continues to assert that the Custodian's statutory power of summary capture is inapplicable to a case in which the asserted debtor denies the existence or amount of the indebtedness. It insists that to give conclusive effect

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In one other case (*Clark* v. *Nii* (D. Haw., Civil No. 837 (unreported), Nov. 19, 1948) a court has held that the Custodian could not summarily collect a debt whose existence the respondent denied. However, that issue was rendered moot when the same court, on January 26, 1949, determined that the vested property, the use of which had given rise to the alleged debt, was owned by an enemy rather than by the respondent, dismissed a pending Section 9(a) suit for return of such property, and ordered payment of the debt to the Custodian.

to the executive determination in such a case would permit the Custodian to create property. And the court below, relying on *Simon* v. *Miller, supra,* indicated that it would "hesitate" to give effect to the Custodian's determination in such a case. (R. 21). It apparently recognized that these dicta were inconsistent with the holdings in *Camp* v. *Miller* and *Clark* v. *E. J. Lavino & Co., supra* (R. 20-21). *Miller* v. *Rouse, supra,* it did not cite or discuss.

The court below held, however, that the present case presents no such question, since the Bank does not deny the existence of the debt, but merely asserts a setoff. More fundamental, the Bank has not suggested that it does not have the sum of $25,581.49. The Custodian has thus done no more than to demand payment of a sum of money which the Bank holds and which he has found to be enemy property because owing to an enemy. There is no attempt to "call property into existence for purposes of seizure." (R. 21).[11] If the Custodian had found that the Bank held that sum as trustee

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[11] The Court of Appeals for the Second Circuit has held that, in a suit by the Custodian to obtain possession of enemy property, the respondent would not be heard to argue that the property demanded (shares of stock) did not in fact exist, because issued for an illegal consideration. *In re Sutherland,* 23 F. 2d 595 (C.A. 2). The court said (23 F. 2d at p. 598):

> "The determination of the Alien Property Custodian had sufficient finality to require the [respondent] to issue stock to the Custodian * * *. Whether the decision of the Custodian was right or wrong was immaterial to the requirement for such transfer."

for or as agent of an enemy, the Bank could not be heard to contend that the money was in fact its own property. *Central Union Trust Company* v. *Garvan, supra; Commercial Trust Company* v. *Miller, supra; Farmers' Loan & Trust Co.* v. *Hicks*, 9 F.2d 848 (C.A. 2), certiorari denied, 269 U. S. 583. We perceive no reason for a different result where the Custodian's finding that the money is enemy property is based on a finding of a debtor-creditor relationship. In either case, the property—a sum of money—is in existence, and the question is who is entitled to it. On that question we think there can be no doubt of the conclusiveness of the Custodian's determination.

In any event, however, there is no warrant in the statute for the assertion that some kinds of determination by the Custodian are conclusive and others not. The grant of authority to make a determination, which will be conclusive for purposes of summary reduction to possession, that money "is so owing" to an enemy necessarily includes the power to determine not only the identity of the creditor but also the existence and amount of the indebtedness.

It is true that in the supposed case of a debtor who, in fact, has not the cash demanded, severe hardship might result from summary enforcement of a turnover directive. The possibility of such hardship would unquestionably be taken into account by the Custodian in considering whether resort to summary proceedings was appropriate.

But, in any event, it should be remembered that the imperative necessities involved in the exercise of a war power such as that of summary seizure necessarily admit of some hardship. In the case of mistaken seizure of any property, the property is returned without compensation for loss of use, loss of an advantageous bargain, decline in value, or other losses arising from withholding of possession for a time.[12] Moreover, the owner is put to the burden of instituting suit and to the risk that, if he is not diligent in doing so, the property may be sold by the Custodian and recovery be restricted to the proceeds of sale.[13] In authorizing such summary proceedings, Congress undoubtedly was aware of these possible hardships, but felt them to be more than counterbalanced by the danger that a denial of the right of summary capture would subject the speedy reduction to possession of enemy property to intolerable delays of litigation.[14] As Judge Learned Hand has eloquently declared:

> The power of the United States peremptorily to reduce to its possession and apply to its use,

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[12] In a wide variety of cases the federal courts have consistently held that losses incident to erroneous seizure are not compensable under Section 9(a) of the Trading With the Enemy Act or otherwise. *Sigg-Fehr* v. *White*, 285 Fed. 949, 952 (C.A. D.C.); *Pflueger* v. *United States*, 121 F. 2d 732 (C.A. D.C.). Cf., *Escher* v. *United States*, 68 C. Cls. 473; *Rodiek* v. *United States*, 100 C. Cls. 267.

[13] Cf., *Sielcken-Schwartz* v. *American Factors*, 60 F. 2d 43 (C.A. 2), certiorari denied, 287 U.S. 654.

[14] A like recognition of the necessity of speedy action even at the risk of hardship is apparent in other wartime statutes. See, e.g., *Yakus* v. *United States*, 321 U.S. 414, 442-443, and cases cited.

> at moments critical in its history, all property which lies within its power is not to be emasculated by the delays of private litigation; the peril may be overwhelming, the need imperative. It is enough that reparation will be available, where reparation is due; meanwhile the individual must comply with the immediate demand just as he must comply with the immensely more grievous demand for the possible sacrifice of life and limb, when that too is called for. [*Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 798 (C.A. 2), affirmed, 332 U. S. 469.]

This case presents a striking example of the insubstantiality of the claims which may be asserted as defenses to the Custodian's demands for the surrender of assets or payment of money. The Bank here relied on a claimed right to setoff. To establish such a right of setoff it is necessary to show mutual, matured obligations between the same parties acting in the same capacities. *Scammon* v. *Kimball*, 92 U. S. 362, 367; 7 *Zollmann, Banks and Banking* (Perm. Ed.) § 4392. But, to support that claim the Bank pleaded only the following (R. 14):

> The indebtedness of the Deutsche Reichsbank arose from the fact that Deutsche Reichsbank was upon information and belief, an instrumentality and part of the German Government. The German Government guaranteed to Manufacturers Trust Company the payment of debts of various German banks to Manufacturers Trust Company. On June 1st, 1940

and June 14th, 1941, the indebtedness of the said banks to Manufacturers Trust Company, was in excess of $25,581.49.[15]

The foregoing assertions directly contradict the Bank's previous sworn declaration of October 31, 1941, to the Treasury Department that the Reichsbank was not indebted to it on either of those dates, while admitting its own indebtedness to the Reichsbank arising by virtue of a deposit account (R. 5-6). And their tenuous nature is readily apparent. Thus, the assertion that the German Government and the Reichsbank were one and the same, so that obligations of the German Government became automatically obligations of the Reichsbank, is made on information and belief only, without any supporting allegations setting out the basis of that belief.[16] Moreover, the Bank's claim against the German Government is only as an alleged guarantor

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[15] In his concurring opinion, Judge Frank found these allegations totally inadequate to support a claim of setoff (R. 24).

[16] The most reliable authority supports the view that the Deutsche Reichsbank was a corporate entity distinct from the German Government, which was not even a stockholder in the bank, although it took profits in excess of a specified amount. See *Military Government Handbook, Germany*, § 5: Money and Banking (Army Service Forces Manual M356-5, March 1945), pp. 66-68. The mere existence of general governmental control over the Reichsbank of course falls far short of establishing sufficient identity for purposes of setoff. *United States* v. *Strang*, 254 U.S. 491; *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U.S. 549; *Coale* v. *Societe Co-op Suisse des Charbons*, 21 F. 2d 180 (S.D.N.Y.); *United States* v. *Deutsche Kalisyndikat Gesellschaft*, 31 F. 2d 199 (S.D.N.Y.); *Amtorg Trading Corporation* v. *United States*, 71 F. 2d 524 (Ct. Cust. & Pat. App.).

of the debts of various other German banks (R. 14). "It is generally held that in the absence of a contract a bank has no right, without a depositor's consent, to apply his deposit to the payment of an obligation for which he is liable as a guarantor, indorser, or surety." 5 Michie, *Banks and Banking* (Perm. Ed.) § 128.[17]

Finally it should be noted that the absence of a federal license under the "freezing" regulations imposed pursuant to Section 5(b) of the Trading With the Enemy Act and Executive Order No. 8389, as amended, 5 F.R. 1400, would be a complete bar to the assertion of any right of setoff which did not exist prior to June 14, 1941, the date on which those regulations became applicable to German property. Executive Order No. 8785, 6 F.R. 2897.[18] The Bank has not alleged that the indebtedness of the German Government which is sought to be set-

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[17] See e.g., *First National Bank of Kansas City, Mo.* v. *Seldomridge*, 271 Fed. 561, 565 (C.A. 8); *Lamb* v. *Morris*, 118 Ind. 179, 20 N.E. 746; *Long Island Bank* v. *Townsend*, Hill & D. Supp. 204 (N.Y.); *Moore* v. *Greenville Banking etc., Co.*, 173 N.C. 180, 91 S.E. 793; *Wills* v. *Citizens Nat. Bank*, 125 N.J.L. 546, 16 A. 2d 804; 1 Morse, *Banks and Banking* (Perm. Ed.) § 334 (p. 777, fn. 2); 7 Zollmann, *Banks and Banking* (Perm. Ed.) § 4590. An exception to this principle may arise in case the insolvency of the party primarily liable is established (Michie, *supra*; Zollmann, *supra*); but in this case, Manufacturers Trust Company has not even asserted the insolvency of the German banks primarily liable.

[18] Plainly the exercise of a right of setoff to extinguish the indebtedness to the Reichsbank would be a "transfer of credit" prohibited by Section 1A of the Order and a dealing in evidences of indebtedness prohibited by Section 1E. Cf. *Propper* v. *Clark*, 337 U. S. 472. See also Treasury Department General Ruling No. 12, 7 F. R. 2991.

off matured prior to that date.[19] Nor has it asserted that the right of setoff had been claimed or otherwise exercised prior to that date.[20] Indeed, the Bank's sworn declaration to the Treasury Department, made in October 1941, that there was no indebtedness of the Reichsbank to it on June 14, 1941 (R. 6), would seem an insurmountable obstacle to the establishment by the Bank of any claim that the right of setoff had been claimed or exercised prior to the effective date of the freezing regulations.

Despite the insubstantiality of its claim, the Bank has nevertheless succeeded in delaying, for more than two and a half years[21] from the date of the Custodian's turnover directive, the payment to the Custodian of the sum demanded. Such delays will be multiplied many times if the Custodian's summary powers are not sustained. The asserted hardship imposed upon the Bank by compliance with the Custodian's demand falls far short of being of sufficient gravity to warrant such interference with the speedy exercise of an important wartime power.

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[19] Maturity is an essential prerequisite to the existence of a right of setoff. *Durkee* v. *National Bank*, 102 Fed. 845 (C.A. 5); *Wright* v. *Seaboard Steel & Manganese Corp.*, 272 Fed. 807 (C.A. 2); *Irish* v. *Citizens' Trust Co.*, 163 Fed. 880 (N.D.N.Y.); *Lebanon Iron Co.* v. *Donnelly & Co.*, 29 F. 2d 411 (E.D. Pa.).

[20] Setoff is not an automatic remedy. *Thomas* v. *Matthiessen*, 232 U. S. 221, 236; 5 Michie, *Banks and Banking* (Perm. Ed.) § 123; 7 Zollmann, *Banks and Banking* (Perm. Ed.) §§ 4392 (p. 8), 4563; cf. *Zimmerman* v. *Hicks*, 7 F. 2d 443, 446 (C.A. 2).

[21] The sum was paid on August 24, 1948.

After compliance with the Custodian's demand for payment, the Bank's remedy is clear under Section 9(a) or Section 32 of the Trading With the Enemy Act. *Camp* v. *Miller, supra.* If the $25,581.49 is in fact not owing to the enemy, the Bank has an "interest, right or title" in the vested property which can be established and recovered in proceedings under either of those sections. Thus, at most the Bank will, if the Custodian's findings should prove erroneous, have been inconvenienced by the temporary loss of possession of the sum demanded. Comparable or more serious claims of hardship have been made and rejected in every case in which the Custodian's summary powers have been sustained. And, indeed, all such claims pale into insignificance when contrasted with the situation of an individual compelled to "comply with the immensely more grievous demand for the possible sacrifice of life and limb." *Silesian-American Corporation* v. *Markham, supra.*

II

SECTION 8(a) OF THE ACT AFFORDS THE BANK NO DEFENSE TO THE PRESENT PROCEEDINGS

A. *The Rights Conferred by Section 8(a) May Not be Asserted in a Summary Proceeding to Enforce the Custodian's Demand*

We have pointed out in the preceding section of this brief that the Trading With the Enemy Act confers upon the Custodian the power summarily to reduce to possession property which is determined to be owned by or owing to an enemy, that

for purposes of such a summary proceeding the administrative determinations are conclusive, and that ample remedies are afforded for a subsequent challenge of those determinations. The Bank asserts, however, that Section 8(a) of the Act creates an exception to this scheme. We believe that examination of the text and legislative history of that section will show that it has a different function. In our view, its purpose is not to permit a summary proceeding to be delayed by litigation of a non-enemy's claim to an interest in the property demanded, but rather to insure that the security interests to which it refers would be fully protected in an appropriate proceeding for return.

Section 8(a) provides in relevant part:

> any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand * * * may continue to hold said property, and, after default, may dispose of the property in accordance with law * * *.

As originally introduced in Congress, the section was intended simply to provide that "American citizens holding security on enemy property may dispose of such security on notice, presentation, or demand served by him on the Alien Property Custodian, with the same force and effect as if duly

served on the enemy personally." See H. Rep. No. 85, 65th Cong., 1st Sess., p. 3; S. Rep. No. 113, 65th Cong., 1st Sess., p. 8. It was thus intended merely to enable security holders to perfect their rights, despite the inaccessibility of enemy mortgagors and the like, by permitting substituted service on the Custodian of the requisite notice or presentation or demand. It appears to have been amended to its present form at the instigation of the New York Stock Transfer Association, which feared that otherwise the Act might be open to a construction permitting the permanent destruction by the Custodian of possessory rights of American security holders. *Hearings before Subcommittee on Commerce, United States Senate*, 65th Cong., 1st Sess., on H.R. 4960, p. 59. While the drafters of the bill, represented by Assistant Attorney General Warren, did not believe that the Act was in any case open to such construction and stated that the amendment did "not affect the bill in any way," they had no objection to such clarification. *Id.* at p. 160.

In brief, Section 8(a) was designed not to protect lienors from the temporary dispossession to which all property holders are subject, but to insure that an American holder of a possessory lien might, in a suit under Section 9(a), recover not merely the value of his equity in the property, but actual possession of the whole of the property subject to his lien. This result might follow from Section 9(a) alone, since it may well be argued that the phrase,

"any interest, right or title," there used to indicate what may be recovered, comprehends a security holder's right to possession. In view, however, of the general doctrine that a possessory lien does not survive surrender of possession (*Restatement, Security*, Sections 11, 80; Jones, *Pledges and Collateral Securities* (2d ed. 1901) Sections 23, 34, 40), it might have been maintained with some plausibility that upon surrender to the Custodian of property in which the holder had a possessory interest, the right to possession and the lien itself would have been lost beyond recovery by suit under Section 9(a), the claimant being reduced to the position of an unsecured creditor. Section 8(a) expressly confirms the right of a stated category of lienholders to recover such possessory rights as they may have had prior to seizure by the Custodian. There is no reason, however, to find in Section 8(a) any more far-reaching purpose, particularly one in conflict with the principle of summary capture which is basic to the efficient administration of the Act.

Any seeming inconsistency between the purpose of Section 8(a) as stated above and the text of the section is resolved when consideration is given to the character of the Custodian's determinations for purposes of a summary proceeding to enforce his demand. We have pointed out (*supra*, p. 10) that in such a proceeding "the determination of the Custodian is conclusive whether right or wrong."

Commercial Trust Co. v. Miller, supra, 262 U. S. at p. 53. The Custodian has determined in his vesting order and in his turnover directive that the debt here demanded was owing to an enemy and that there were no valid counterclaims or offsets to that debt. These findings, by implication, if not expressly, preclude the existence of the claimed security interests. If these findings are given the effect which the Act requires, the Bank cannot be regarded, in this action, as a person holding any type of security interest in the vested indebtedness. Accordingly, it cannot for present purposes be regarded as having any rights under Section 8(a). Any claim which it may make to rights under that section, like any other contention that the Custodian's findings were erroneous, can be fully considered in an appropriate proceeding for return. In such a proceeding, any possessory rights of the Bank under Section 8(a) or otherwise can be fully protected.

A contrary result would create a strange anomaly in the Act. It is settled that an American owner of property vested by the Custodian must surrender to the Custodian's determination of enemy ownership and must give up the property on demand, even if that determination is wrong. It would be strange, indeed, if the holder of a mere security interest, who has no title and only a conditional right of possession, should be given a privilege which is denied to an outright owner. Moreover, the allowance of such a privilege would seriously

impair one of the basic purposes of the Act, which is to permit a summary and speedy reduction to possession of vested property; for if any such defense to a summary proceeding is allowed, the Custodian may be subjected to innumerable vexatious delays caused by the assertion of even frivolous claims to the protection of Section 8(a). From what has been said, we think it clear that Section 8(a) is given a rational explanation, consistent with both its text and the basic scheme of the Act, if it is held to protect holders of various security interests from being placed in a worse position than other owners of interests in vested property. To construe it as discriminating in favor of pledgees, lienors and the like by conferring on them a privilege which is denied to an absolute owner would be gratuitously to attribute to Congress an extreme capriciousness.

Not only does the Bank's construction of Section 8(a) attribute to Congress a degree of solicitude for security interest holders which is without rational basis and which, indeed, goes far beyond the degree of protection which the representatives of those interests sought before Congress, but that construction is without support in any judicial holding. It is true that there are dicta in unreported opinions of Judge Augustus N. Hand which seem to indicate that lienors within the scope of Section 8(a) might be entitled to resist the Custo-

dian's demand.[22] But it is highly significant that the only cases which we have been able to find in which rights under Section 8(a) were recognized were suits under Section 9(a) for the return of property of which the Custodian already had possession. *Mayer* v. *Garvan*, 278 Fed. 27 (C.A. 1); *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656 (S.D. N.Y.), affirmed, *sub nom. Standard Oil Co.* v. *Clark*, 163 F. 2d 917 (C.A. 2), certiorari denied, 333 U. S. 873).[23] As Judge Anderson (dissenting on other grounds) said in *Mayer* v. *Garvan, supra*, 278 Fed. at pp. 35-36:

> At the outset it should be held clearly in mind that the case before us does not involve the right of the Custodian to seize the property in question. It involves only his right to retain it, or, as the case now stands, to retake a portion of it after accounting by the plaintiff.

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[22] See e.g., *Garvan* v. *$50,000 Bonds* (S.D.N.Y.), July 29, 1919, affirmed, *sub nom. Garvan* v. *$20,000 Bonds*, 265 Fed. 477 (C.A. 2), affirmed, *sub nom. Central Union Trust Co.* v. *Garvan*, 254 U. S. 554 (Record on Appeal, No. 394, October Term, 1920, pp. 82-83). Summary transfer of possession was ordered in that case, nevertheless, on the ground that the lien there claimed was not a possessory lien of the nature contemplated by Section 8(a). The Court of Appeals and this Court simply ignored the contention.

In *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 797 (C.A. 2), Judge Learned Hand assumed, *arguendo*, that the section might afford to an American pledgee a defense to a summary proceeding, but held that it could not be availed of by a pledgee who was a foreign national. This Court affirmed that holding without mention of the possible scope of the rights afforded to an American pledgee. *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, 478-479.

[23] On appeal in the *Standard Oil* case, however, the Court of Appeals held that the alleged lien did not in fact exist. *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 927-928 (C.A. 2).

> This anomalous and somewhat confusing situation—of a right to seize what may not be lawfully retained—arises out of the necessities of war. It is expressly contemplated by the act. Compare *Central Trust Co.* v. *Garvan* * * * where, for the purposes of immediate possession, the determination of the Custodian was held conclusive "whether right or wrong." In some cases, including the opinion of the court below, are expressions as to the Custodian's right to seize, when what is really meant is the Custodian's right to retain. It is solely with the right to retain, or condemn as alien enemy property, that this case is concerned. The seizure by the Custodian neither made, destroyed, nor affected any rights now in question.

B. *The So-called "Banker's Lien" Here Asserted Is Not Within the Scope of Section 8(a)*

In any event, however, the Bank has not brought itself within the scope of Section 8(a). That section applies only to a carefully circumscribed class of security interests—mortgages, pledges, liens, or other rights "in the nature of security in property of an enemy" which "may be disposed of on notice or presentation or demand."

The court below held that the right here asserted does not come within that class of security interest. It stated (R. 22-23):

> In our opinion the Bank's right of set-off is not a "lien or other right in the nature of security in property of an enemy," within the meaning of the statutory language. Although

sometimes referred to as a "banker's lien," the right of set-off is not technically a lien, and certainly not a lien in property of an enemy, for the deposit of money in a bank passes title to the money and creates the ordinary debtor-creditor relationship. A creditor has no possessory lien on the general assets of his debtor. The reference in § 8 to "property *** which, by law or by the terms of the instrument ***, may be disposed of on notice or presentation or demand," makes it quite plain, we think, that the security interests protected are those in specific property which may have been hypothecated by pledge, mortgage, etc., or otherwise subjected to a possessory lien, but does not cover property constituting the general assets of a debtor against which the enemy asserts only a claim as a creditor.

In so holding, we believe the court was clearly right. If Section 8(a) is to be construed as constituting an anomalous exception to the statutory scheme, and as permitting one who asserts rights under it to delay the Custodian's reduction of vested interests to possession by litigation as to the existence of the asserted non-enemy rights, it seems obvious that the coverage of the section should not be expanded beyond its terms.[24]

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[24] See the decision of Judge Augustus Hand in *Garvan* v. *$50,000 Bonds*, cited *supra*, note:

> The effect of my decision is to hold that the statute gives the right to the Alien Property Custodian to obtain possession of enemy owned property irrespective of the existence of liens thereupon unless such liens may be disposed of on notice or presentation or demand. In enacting

Here the Bank does not assert a true lien at all. It asserts merely a right of setoff which it seeks to describe by the term "banker's lien." Such a right of setoff clearly fails to come within Section 8(a). It is not a right "in the nature of security in property of an enemy." The relationship between Manufacturers Trust Company and the Deutsche Reichsbank is purely a debtor-creditor relationship induced as the result of a general deposit. *Bank* v. *Lanier*, 11 Wall. 369, 375; *Scammon* v. *Kimball*, 92 U. S. 362, 370; *New York County Bank* v. *Massey*, 192 U. S. 138, 145; *Burton* v. *United States*, 196 U. S. 283, 301. As the Court said in *New York County Bank* v. *Massey*, "the money deposited * * * creates an ordinary debt, not a privilege or right of a fiduciary character" (p. 145). This conclusion was emphasized when the court went on to say that a deposit of money "is not a transfer of property as a payment, pledge, mortgage, gift or security" (p. 147). From the time of the deposit it is no longer property of the depositor, but "becomes a part of the general fund of the bank." *New York County Bank* v. *Massey*, *supra*, at p. 145;

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this statute under the War Power Congress doubtless realized the fact that much enemy owned property was subject to possessory liens of various kinds and that the Act would be quite ineffective if third persons, in many cases business associates of the enemy aliens, could indefinitely hold their property or compel a trial on the merits, before transfer of possession could be awarded. Consequently a right to retain possession was given only to those lienors whose business requirements naturally demanded it. [Record on Appeal in No. 394, October Term, 1920, p. 83.]

Burton v. *United States*, *supra*, at p. 297. Thus the claimed right of setoff would give the Bank at most a right to withhold payment of money which is the Bank's property; it involves no right "in the nature of security in property of an enemy."

Moreover, the statute further requires that the right in the nature of security in property be such that it can be disposed of on default of the underlying obligation. It is apparent, however, that a general deposit account lacks altogether the characteristic of disposability. To speak of the Bank as having a right to dispose of its own property on default of the debt, and hold the excess proceeds, if any, for the Custodian's account, is a manifest absurdity. The most that the Bank can do with such deposit funds in the event of default on a debt of the depositor to the Bank is, under particular circumstances (not here present, as is shown, *supra*, pp. 17-20), to setoff the amount of the deposit against the amount of the past due obligation. Such a right cannot possibly be regarded as a right to "dispose of" property of the enemy within the contemplation of Section 8(a).

The failure of the right of setoff to constitute a security right within the intendment of Section 8(a) is emphasized by comparing it with a true banker's lien which does possess the requisite elements of a security interest in property of another entitling the creditor to dispose of that property on default and would, accordingly, come within

the provisions of the section. Thus, a bank has a true lien

> * * * on the securities belonging to its customer and received from him in the regular course of his business for the balance due to the bank from such customer, provided that there is no contract, express or implied, or circumstances showing a particular mode of dealing inconsistent with it * * *.
>
> This lien should not be confused with a set-off though courts occasionally confound the two conceptions. It does not extend to the money left on deposit according to the customs and usages of banks. It is confined to securities and valuables which may be in the banker's possession as collaterals. [5 Zollman, *Banks and Banking* (Perm. Ed.) § 3051.] [25]

It is true that some courts have confounded the two types of interest by referring loosely to a right of setoff as a "banker's lien." E.g., *Gonsalves* v. *Bank of America*, 16 Cal. 2d 129, 105 P. 2d 118; *Falkland* v. *St. Nicholas National Bank of New*

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[25] See also *Irish* v. *Citizens' Trust Co.*, 163 Fed. 880, 892 (N.D.N.Y.); *Beaver Boards Cos.* v. *Imbrie & Co.*, 287 Fed. 158, 163 (N.D.Ga.); *Lowden* v. *Iowa-Des Moines Nat. Bank & Trust Co.*, 10 F. Supp. 430, 433 (S.D. Ia.), affirmed, 84 F. 2d 856 (C.A. 8), certiorari denied, 299 U. S. 584; *Fourth Nat. Bank of Chicago* v. *City Nat. Bank of Grand Rapids*, 68 Ill. 398, 402; *Furber* v. *Dane*, 203 Mass. 108, 117-118, 89 N.E. 227, 230; Note (1925) 38 Harv. L. Rev. 800; 5 Michie, *Banks and Banking* (Perm. Ed.) § 114; 1 Morse, *Banks and Banking* (Perm. Ed.) § 336.

York, 84 N. Y. 145, 149.[26] And it may be that for most practical purposes one is as useful a security device as the other. Cf. Note (1925) 38 Harv. L. Rev. 800, at pp. 800-801. But it is settled that in considering the application of a federal statute the terminology applied by state courts is not controlling. *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110, 114; *Helvering* v. *Clifford*, 309 U. S. 331, 334-335; *Commissioner* v. *Tower*, 327 U. S. 280, 287-288. Cf. *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 193-194. Whatever New York may call the right of setoff here asserted, it is plain that it does not constitute the kind of security interest to which Section 8(a) was intended to relate.

III

THE CUSTODIAN IS ENTITLED TO INTEREST, AT A REASONABLE RATE, ON THE SUM DEMANDED IN THE TURNOVER DIRECTIVE FROM THE DATE OF ITS SERVICE TO THE DATE OF COMPLIANCE WITH IT

From the foregoing, it is apparent that service on the Bank of the Custodian's turnover directive imposed on the Bank an unqualified duty of immediate compliance. The demand for possession made in that directive was intended to be "no less immediately effective than a taking with the strong

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[26] *Studley* v. *Boylston Bank*, 229 U. S. 523, on which the Bank relied in this connection (Bank's petition for writ of certiorari, p. 9), is not such a case. The distinction between a true banker's lien and a banker's right of setoff is there made explicit at p. 528.

hand" (*Central Union Trust Co.* v. *Garvan*, *supra*, at p. 568); its enforcement was not to be impeded by "the delays of private litigation" (*Silesian-American Corporation* v. *Markham*, *supra*, at p. 798). It is evident, then, that the Bank unreasonably detained a sum of money which the Trading With the Enemy Act obligated it to pay forthwith upon the Custodian's demand. Accordingly, the District Court held the Bank liable for interest by way of damages for the unlawful detention. The majority of the court below, however, reversed on this point, stating that it saw "no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment" (R. 23). The majority appears to have based its decision on the fact that the Trading With the Enemy Act "contains no provision for the payment of interest or any other penalty in the event of non-compliance with the Custodian's demand that enemy-owned property be turned over to him" (*Ibid.*). Judge Clark, dissenting, pointed out, however, that since the Bank "took upon itself the decision to detain the money without legal right, and had the use thereof during the period of detention, the usual rule of interest on illegally withheld payments should apply" (*Ibid.*).

What Judge Clark denominated as the "usual rule" has been clearly set out in a number of decisions of this Court. Those decisions, old and recent, have made it clear that little, if any, significance is to be given legislative silence in respect to the

granting or denial of interest. In numerous cases this Court and lower federal courts have awarded interest on obligations created by federal law, despite the absence of any statutory provision for such interest. Interest has been awarded not as a penalty, but for the reasons on which Judge Clark based his dissent here: to indemnify the United States for the wrongful withholding of money which it was entitled to possess and use, and to avoid the unjust enrichment of the person who wrongfully retained and used the money. E.g., *Billings* v. *United States*, 232 U. S. 261; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Maryland Casualty Co.* v. *United States*, 76 F. 2d 626 (C.A. 5). Closely apposite to the instant case is that of *Royal Indemnity Co.* v. *United States*, *supra*. In that case the United States brought suit to enforce a surety's liability conditioned on a taxpayer's payment of his tax with interest. The surety pointed out that the statute made no provision for interest and contended that the Government's delay in bringing the action excused payment of interest. Chief Justice Stone rejected these contentions, saying (313 U. S. at pp. 296-297):

> Here, responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor. And in the meantime the debtor has had the use of the money, of which its default has deprived the creditor. Interest upon the principal sum from the date of default, at a fair

rate, is therefore an appropriate measure of damage for the delay in payment.

The principles followed by this Court were fully recapitulated in its recent opinion in *Rodgers* v. *United States*, 332 U. S. 371, 373:

> * * * the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. * * * For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. * * *
>
> As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.

Thus, since a fine is imposed in a criminal case as a punishment or deterrent rather than for the financial advantage of the United States, criminal penalties do not bear interest. *Pierce* v. *United*

States, 255 U. S. 398, 405-406. The *Rodgers* case, *supra*, applied this principle to penalties imposed on noncooperators under the Agricultural Adjustment Act. On the other hand, failure to pay a tax when due is held to entitle the United States to interest. E.g., *Billings* v. *United States*, *supra*. Similarly, interest has been awarded in a suit to recover the amount of advance payments from the surety of a defaulting contractor (*United States* v. *U. S. Fidelity Co.*, 236 U. S. 512), and in a suit to recover the value of lands with which the United States was induced to part through the defendant's fraud (*Jones* v. *United States*, 258 U. S. 40).

The precise question here at issue was decided contrary to the majority decision below by the Court of Appeals for the Third Circuit, in *Clark* v. *E. J. Lavino & Co.*, *supra*, which allowed the Custodian's claim for interest from the date of service of the turnover directive, despite respondent's claim of a right of setoff. That court, recognizing that the circumstances of its case were "analogous" to those of the instant case (Motion, *supra*, at p. 10),[27] expressly approved the dissenting opinion of Judge Clark. After a review of the pertinent cases the court made the following analysis (Motion, *supra*, at pp. 11-13):

> The Act creates the obligation to turn over on demand the property of the alien, not only to

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[27] The Bank contends, however, that the instant case and the *Lavino* case are not "analogous" because in the latter case "the non-compliance was not based on substantial or reasonable grounds, hence the award of interest was proper,"

> keep such property from being used for the benefit of the enemy but also to "affirmatively compel the use and application of foreign property" in "the interest of and for the benefit of the United States." See H.R. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2-3; 55 Stat. 839, 50 U.S.C. App. 5(b)(1).
>
> When the Custodian served his turnover directive upon Lavino the latter had an immediate duty to comply. The statute requires an immediate transfer of the property to the Custodian without resort to the courts by the holders of the property.
>
> * * * [A denial of interest] would place a premium upon disobedience to the mandate of the statute and reward the recalcitrant.

We believe that the Court of Appeals for the Third Circuit in the *Lavino* case, and the dissenting

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whereas the refusal to grant interest in the present case was "a proper exercise of discretion" because "the refusal was based on meritorious grounds." Bank's Petition for Rehearing, page 3. There are two short answers to this alleged basis of distinction. In the first place, the opinion in *Lavino* clearly shows that the court rested its decision on the overall equities and not on the merit or demerit of the reasons for refusal to pay. The court there called attention to the fact that, upon service of the turnover directive, "the statute requires an immediate transfer of the property to the Custodian without resort to the courts by the holders of the property," and that "to hold otherwise would place a premium upon disobedience * * * and reward the recalcitrant." Motion, *supra*, at p. 13. In the second place, it is difficult to see that the Bank's grounds for refusal to pay were more "meritorious" than Lavino's. If any comparison is to be drawn, it would probably favor Lavino, which at least asserted its claim before vesting, whereas the Bank sought to "correct" its own "erroneous" report only after vesting, more than four years later. See pp. 17-18, *supra*.

judge below, correctly interpreted and applied the standards laid down by this Court as to the award of interest where Congress is silent. The obligation to turn over sums demanded by the Custodian is not, of course, imposed as a fine or penalty of any description. The statute creates the obligation, not only to keep the property from being used for the benefit of the enemy, but also to "affirmatively compel the use and application of foreign property" in "the interest of and for the benefit of the United States." H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2-3; 55 Stat. 839, 50 U.S.C. App. § 5(b)(1); *Clarke* v. *E. J. Lavino & Co., Motion, supra,* at pp. 11-12. Indeed, the most recent amendment of the Act shows that this must be regarded as a major purpose of the statute, for it provides in substance that vested German and Japanese property shall not be returned to its former owners nor compensation paid to them, but that the net proceeds of such property shall be covered into the Treasury where they will be available for payment of certain claims of American citizens arising out of the war and for such other purposes as Congress may prescribe. Act of July 3, 1948, 62 Stat. 1246, 1247, 50 U.S.C. App., Supp. II, §§ 2011, 2012.[28] The obligation which the present suit was brought to enforce must, therefore, be regarded as one imposed for the "financial advantage" of the United States, within the rule stated in the *Rodgers* case.

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[28] For lucid exposition of the considerations underlying this legislative policy, see Rubin, *"Inviolability" of Enemy Private Property* (1945), 11 Law and Contemporary Problems 166.

The court below sought to distinguish the *Billings* case and other cases cited above (except *Lavino*, which had not then been decided) on the ground that they "involve taxes or advances where the right to the money was finally adjudicated" (R. 23). This distinction has no substance. In the tax cases,[29] as in this, Congress has decided that the public interest requires that the Government's receipt of money be not subject to the delay inherent in judicial proceedings—in other words, that the Government is entitled to possess and use the money in the period between its demand and final adjudication of the lawfulness of the exaction. See *Salamandra Ins. Co.* v. *New York Life Ins. & Trust Co.*, 254 Fed. 852, 860-861 (S.D.N.Y.).

Thus, in the tax cases as in this, the possibility that the Government may, after full adjudication, be held not entitled to keep the sums collected can affect neither the Government's right to possess and use such sums in the interim period, nor its corollary right to be compensated for deprivation of that right. *Maryland Casualty Co.* v. *United States*, *supra*, is particularly apposite. There the Government brought an action on a bond to secure payment of a tax deficiency, the condition of the bond being the taxpayer's payment of the "deficiency in the

[29] The right of the Government to collect its internal revenue by summary administrative proceedings has long been settled. *Phillips* v. *Commissioner*, 283 U. S. 589, 595. The Trading With the Enemy Act is, in fact, only one of a number of statutes which empower the Government to insist upon compliance with its orders prior to judicial review of their lawfulness. See *Yakus* v. *United States*, 321 U. S. 414, 442-3, and cases cited.

tax found due by the Commissioner." The surety defended the suit on the ground that the tax was not legally owing and had, in fact, been determined in bankruptcy proceedings not to be owing. The court recognized that the taxpayer might "after paying seek refund of anything he did not owe" or that the surety might, after paying, be so subrogated to the taxpayer's rights as to be entitled to ask refund of any unlawful exaction. 76 F. 2d at p. 627. But the court treated the ultimate correctness of the Commissioner's determination as immaterial to the right of the United States to interest as compensation for the unjust withholding of money which the United States was entitled at least temporarily to possess and use. "The object of the bond was to assure prompt payment * * * of the taxes claimed by the Commissioner; not then to start a lawsuit about them." *Ibid.* The court assessed interest against the surety, at the legal rate, from the date of notice and demand upon it. There is no reason to suppose that the result would have been different if the taxpayer had not, by posting bond, transferred his responsibility to the surety, for the taxpayer's statutory obligation to pay would have been quite as absolute as the surety's contractual obligation.

If the Custodian should be denied interest when there is delay in complying with his money demands, the effectiveness of the summary powers which Congress has conferred on the Custodian would be materially impaired. As in the tax cases, a principal purpose of the summary procedure au-

thorized by Congress and approved by the courts, is the prevention of delaying litigation designed simply to postpone as long as possible the loss of use of such money. In practice, if there is to be assurance of an "immediate transfer * * * without resort to the courts" (*Clark* v. *E. J. Lavino & Co.*, Motion, *supra*, at p. 12), delay in compliance must be rendered unprofitable. This can be achieved only by the award of interest. Otherwise, even though persons required to pay relatively small sums of money might not choose litigious delay, those on whom large demands are served would find it profitable to delay payment as long as possible for the continued interest-free use of the money. Thus, not only would the Custodian be hampered in the exercise of his powers, but the practical working of the statute would produce inequities between individuals based solely on the quantity of money at stake.

The statement by the court below that the Custodian can obtain an order directing compliance "without delay" (R. 23) is unfortunately not accurate. It would be illusory to hope for speedy adjudication of such matters in view of the notoriously overcrowded condition of most federal dockets. In the instant case, some seven weeks elapsed between the filing of the Custodian's petition and the entry of the order, while in the *Lavino* case the corresponding period was 8½ months. Moreover, the administrative burden of the Custodian and the cost to the Government would be greatly increased if every demand for possession must be litigated.

In brief, the purpose of Congress to preclude dilatory tactics on the part of holders of enemy property can be fully effectuated only if such tactics are made unprofitable; and they will remain profitable if the recalcitrant is held immune from the ordinary requirement that he pay a fair rate of interest for the period during which, without legal right, he detains the property. Congress assuredly did not create the summary procedure for obtaining property with the intention that flouting of that procedure should result in the enrichment (through interest-free use of the property involved) of the person flouting it. See *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 568-569.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the cause remanded with directions to reinstate the judgment of the District Court.

Respectfully submitted,

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SEPTEMBER, 1949.

APPENDIX

Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U.S.C. App. 1-31):

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839]:

* * * * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time

by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * * *

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020]:

* * * * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * *

SEC. 8. (a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: *Provided,* That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: *Provided further,* That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of

that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948.~~ 1949

No. ~~336~~ 11

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Petitioner,

v.

MANUFACTURERS TRUST COMPANY.

BRIEF IN OPPOSITION TO PETITION OF TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Petitioner,

v.

MANUFACTURERS TRUST COMPANY.

BRIEF IN OPPOSITION TO PETITION OF TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN FOR WRIT OF CERTIORARI.

Statement.

The Alien Property Custodian, hereinafter referred to as "Custodian", issued a vesting order which described the property thereby vested as a debt owing to Deutsche Reichsbank by Manufacturers Trust Company, hereinafter referred to as "Bank", arising out of a dollar account and any and all rights to demand, enforce and collect same. The vesting order made no determination as to the amount of the debt owing by Bank. It was contended by the Bank that while, at the time of the issuance of the vesting order, the sum of $25,581.49 stood to the credit of the Reichsbank deposit account on its books, the Bank was not indebted to the Reichsbank by reason of the fact that

the Reichsbank was indebted to the Bank on a matured obligation in excess of said sum. Thereafter, the Attorney General, as Successor to the Custodian, issued a turnover directive wherein he found the sum of $25,581.49 was owing by the Bank to the Reichsbank without any offset or counterclaim and demanded payment of said sum. Upon the Bank's refusal to pay the said sum, the Attorney General instituted a summary proceeding under Section 17 of the Trading with the Enemy Act.

The District Court for the Southern District of New York made an order directing the Bank to pay the said sum with interest from the date of the turnover directive. An appeal was thereupon taken by the Bank from the said order to the United States Court of Appeals for the Second Circuit. It was contended by the Bank in the proceeding before the District Court and on appeal that the Custodian and the Attorney General, as his successor, had no power to vest a disputed debt until the existence and the amount thereof is judicially determined in a separate proceeding. In the opinion of the Court of Appeals, Swan, *J.* (Clark, *J.*, concurring in that portion of the opinion) stated that if a putative debtor denies the existence of any debt whatever, the Court would hesitate to hold that the Custodian's power extends so far as to make his *ex parte* determination that there is a debt and the amount thereof conclusive in a proceeding under § 17. Nevertheless, it was held that the Bank's assertion of a set-off against the deposit balance admittedly due is in the nature of an independent claim which must be litigated in a proceeding instituted under Section 9 of the Trading with the Enemy Act. The Bank, by separate petition, is now seeking

a writ of certiorari to review that part of the judgment of the Court of Appeals which directed payment of the $25,581.49.

The majority of the Court of Appeals (Swan and Frank, *JJ.*) held that the Custodian was entitled to interest only from the date of the order made in the proceeding under Section 17 of the Trading with the Enemy Act. The Attorney General seeks a writ of certiorari to review that part of the judgment which modified the order of the District Court by striking out the award of interest.

POINT I.

The decision of the Court of Appeals was proper.

The Court of Appeals disallowed interest upon the ground that the summary procedure provided by Section 17 of the Trading with the Enemy Act enabled the Custodian without delay to obtain an order directing compliance; that the order made in such proceeding will bear interest from the date of its entry; and that the Trading with the Enemy Act contains no provision for interest or any other penalty in the event of non-compliance with the Custodian's demand.

Billings v. *United States*, 232 U. S. 261; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Maryland Casualty Co.* v. *United States*, 76 Fed. 2d 626, relied upon by the Attorney General, are not controlling on the question of interest. Those cases dealt with interest on tax payments due to the United States; in other words, fixed obligations due to the United

States. In *Billings* v. *United States*, *supra*, it was held that interest is recoverable on taxes which have been illegally withheld because the government is entitled to the immediate use of the money and also because an aggrieved taxpayer who sues to recover the taxes which have been illegally exacted may recover interest from the time of payment to the United States.

If a statute creates an obligation to the United States, interest will be awarded even though the statute is silent with respect to interest if the allowance thereof would be equitable. *Rodgers* v. *United States*, 332 U. S. 371. It was stated in the aforementioned case, at page 373, that "one for whose financial advantage an obligation was assumed or imposed and who has suffered actual damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained".

The Trading with the Enemy Act did not create an obligation to the United States. It merely imposed a duty upon a person holding property of an enemy to deliver such property upon demand to the Custodian, which property was to be used in accordance with the future determination of the Congress.

At the time of the issuance of the vesting order and of the turnover directive, Congress had not determined what use was to be made of the property. On July 3, 1948 the Trading with the Enemy Act was amended to provide that vested German and Japanese property shall not be returned to its former owners nor compensation be paid to them but that the net proceeds of such property shall be covered into the Treasury. P. L. 896, 80th Congress, Second Session.

July 3, 1948, Par. 12. However, this amendment did not permit the United States to use property to which a claim was made by its own citizens.

Section 9(a) of the Trading with the Enemy Act provides in substance that any person not an enemy or ally of an enemy claiming any interest, right or title in any monies or property delivered or paid to the Custodian or to whom any debt may be owing from an enemy or an ally of an enemy whose property shall have been delivered or paid to the Custodian, may file a claim with the Custodian and that the President may thereupon order the payment, transfer or delivery to said claimant of the monies or property held by the Custodian; if the President shall not order such payment or delivery of the property the claimant may institute a suit in equity to obtain an order directing the payment or delivery of such property to the claimant upon the claimant's establishing of his claimed right, title and interest or debt. It is further provided that upon the institution of such suit the money or property delivered to the Custodian shall be retained until any final judgment or decree entered in favor of the claimant shall be fully satisfied by payment or delivery of the property or until final judgment or decree shall be entered against the claimant or the suit be otherwise terminated.

In the instant case the Bank refused to make the payment of the deposit balance because it asserted a right of setoff against it. The Court of Appeals directed the payment upon the ground that the asserted right of setoff is a cross claim which should be litigated in the proceeding instituted under Section 9 of the Act.

The vesting by the Custodian under the Trading with the Enemy Act is tantamount to confiscation of the property of the enemy but such vesting is not a confiscation of the property rights of citizens. *Heckel v. Sutherland*, 271 U. S. 298.

The Attorney General concedes that a proceeding under Section 17 is purely possessory and that it does not determine the ultimate right to retain property (p. 13). If such a proceeding lacks the finality of a determination that a fixed amount of principal is actually owing, there is nothing upon which an award of interest can be predicated.

While on the one hand the Attorney General states that interest should not be awarded as a penalty, on the other hand he urges that interest should be imposed to discourage delay and make unprofitable delay in compliance with the Custodian's demands.

As pointed out by the Court of Appeals, there need not be any delay in full compliance for summary proceedings to compel payment is available to the Custodian under Section 17 of the Act. The Attorney General takes issue with the Court of Appeals' statement that it can obtain an order directing compliance without delay by pointing out that in the instant case seven weeks elapsed between the filing of the Custodian's petition and the entry of the District Court order (p. 12).

It should be noted that the turnover directive was issued on January 27, 1947. The Attorney General did not apply for an order under Section 17 of the Act until October 29, 1947. The motion was heard and decided on November 13, 1947. The Attorney General delayed the entry of the order until December 12, 1947. Any delay was that of the Attorney

General. The Attorney General could have resorted to summary proceedings in January, 1947 and obtained an order within a short time thereafter with the provision for payment of interest from the date thereof.

In any event the award of interest lies within the sound discretion of the Court. Interest should not be awarded for delay in payment found to be due if there is a reasonable ground for such delay. It has been held that even where a statute provides for the awarding of interest where money is "withheld by unreasonable and vexatious delay of payment" interest will not be allowed if the debtor raised a plausible defense. *Adler v. Consumers Co.*, 152 Fed. 2d 696.

POINT II.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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HENRY LANDAU,
On Brief.

IN THE

Supreme Court of the United States

OCTOBER TERM ~~1948~~ 1949

No. ~~966~~ 11

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Petitioner,

vs.

MANUFACTURERS TRUST COMPANY,

No. ~~445~~ 15

MANUFACTURERS TRUST COMPANY,

Petitioner,

vs.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

MEMORANDUM IN OPPOSITION TO THE ATTORNEY GENERAL'S MOTION FOR LEAVE TO FILE PETITION FOR RE HEARING OF ORDER DENYING HIS PETITION FOR WRIT OF CERTIORARI AND MOTION BY MANUFACTURERS TRUST COMPANY FOR LEAVE TO FILE PETITION FOR RE HEARING OF AN ORDER DENYING ITS PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE CORY PRESS N. Y. C.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948.

No. 386.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Petitioner,

vs.

MANUFACTURERS TRUST COMPANY.

No. 443.

MANUFACTURERS TRUST COMPANY,

Petitioner,

vs.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

MEMORANDUM IN OPPOSITION TO THE ATTORNEY GENERAL'S MOTION FOR LEAVE TO FILE PETITION FOR RE-HEARING OF ORDER DENYING HIS PETITION FOR WRIT OF CERTIORARI AND MOTION BY MANUFACTURERS TRUST COMPANY FOR LEAVE TO FILE PETITION FOR RE-HEARING OF AN ORDER DENYING ITS PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Manufacturers Trust Company opposes the motion of Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, for re-hearing

of the Court entered January 17, 1949 denying the Government's petition for certiorari upon the ground that there is no conflict between the decision of the Court of Appeals for the Second Circuit in the instant case and the decision of the Court of Appeals for the Third Circuit in *Clark* v. *E. J. Lavino & Co.* In the event that the Attorney General's petition for rehearing is granted, Manufacturers Trust Company respectfully moves for rehearing of the order of this Court entered on January 17, 1949 denying the petition for writ of certiorari upon the ground that this Court cannot properly and fully determine the questions raised by the Attorney General upon his petition for writ of certiorari without determining the subsidiary issues raised by the application of Manufacturers Trust Company for writ of certiorari.

MEMORANDUM IN OPPOSITION TO THE ATTORNEY GENERAL'S PETITION FOR REHEARING

There is no conflict between the decision of the Court of Appeals for the Second Circuit in this case and the decision of the Court of Appeals for the Third Circuit in *Clark* v. *E. J. Lavino & Co.*

Those propositions are basic:

That the Trading with the Enemy Act makes no provision for penalty or interest upon non-compliance with the Alien Property Custodian's or the Attorney General's demand; that the award of interest is discretionary; that where the refusal to comply with the turnover directive and the correctness of the Custodian's determination is based upon unsubstantial grounds, interest may, in the discretion of the Court, be awarded to discourage vexatious and unreasonable

delay; but if there is a substantial dispute and the delay is based upon reasonable grounds, interest should not be awarded.

In the *Lacina* case the non-compliance was not based on substantial or reasonable grounds, hence the award of interest was proper. In the instant case, the refusal was bottomed on meritorious grounds, hence the failure to award interest was a proper exercise of discretion.

While it is true that in this case and in the *Lacina* case the refusal was based upon a claimed set off, the two cases are not otherwise analogous.

In the *Lacina* case, the claimed set-off was based on a claim for unliquidated damages which obviously could only be established by subsequent litigation. There was no present indebtedness of the enemy in a sum certain which could be set off by Lacina against its present indebtedness to the enemy, therefore, the refusal to comply with the Attorney General's demand was clearly unreasonable.

In this case, Manufacturers Trust Company's asserted set-off was predicated on a fixed indebtedness in a sum certain which was absolutely due prior to the issuance of the vesting order.

Furthermore, in the *Lacina* case, the respondent asserted only a procedural set-off which clearly was not available under Section 17 of the Trading with the Enemy Act.

Manufacturers Trust Company contended that the existence of a debt could not be determined from the status of any one account, but must be determined from the status of all the accounts between itself and the enemy. In short, Manufacturers Trust Company

was asserting a substantive right of set-off, based on the Franklin bankers' lien. In so doing, Manufacturers Trust Company thought its position found ample justification in precedents such as *Strauss v. Meller*, 208 Fed. 529.

The fact that the Court of Appeals for the Second Circuit directed Manufacturers Trust Company to comply with the Custodian's demand does not imply that Manufacturers Trust Company's refusal to comply with the demand in the first instance was unreasonable. There was a substantial dispute between Manufacturers Trust Company and the Attorney General and its actions were not dilatory. The decision of the Court of Appeals for the Second Circuit merely holds that in such circumstances it is proper to deny interest.

PETITION FOR RE HEARING OF THE ORDER DENYING MANUFACTURERS TRUST COMPANY S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT—

In the event that the Attorney General's petition for re-hearing of the order denying his petition for writ of certiorari is granted, this Court will perforce have to pass upon the nature of the dispute between Manufacturers Trust Company and the Attorney General. In view of the foregoing, Manufacturers Trust Company respectfully prays that its petition for re-hearing of the order of this Court denying its petition for writ of certiorari in this case be granted.

The decision of the Court of Appeals for the Second Circuit is in conflict with the well-established principle that a bank's right of set-off is a matter of substantive right and that the bank may at any time apply a deposit balance due from the bank to the depositor in

payment of a past due obligation of a depositor. The question presented by Manufacturers Trust Company's petition for writ of certiorari is of great importance to banks throughout the country. Presumably, the Attorney General will not object to the granting of Manufacturers Trust Company's petition for writ of certiorari. In his memorandum submitted in opposition to Manufacturers Trust Company's original petition for writ of certiorari, the Attorney General stated that it would be appropriate for this Court to review the broad question of the Custodian's power to require the payment to himself of sums of money which he determines to be owed.

Wherefore, Manufacturers Trust Company respectfully prays that the Attorney General's petition for re-hearing should be denied, and in the event that it is granted, that its petition for re-hearing should likewise be granted.

June 1949

Respectfully submitted,

MANUFACTURERS TRUST COMPANY,
Respondent

By LESTER E. DENONN
Counsel for Respondent and
Petitioner.

Certificate of Counsel.

I, LESTER E. DENONN, Counsel for Respondent, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

LESTER E. DENONN,
Counsel for Respondent and
Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 11.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,

Petitioner,

vs.

MANUFACTURERS TRUST COMPANY.

No. 15.

MANUFACTURERS TRUST COMPANY,

Petitioner,

vs.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN NO. 11 AND FOR THE PETITIONER IN NO. 15.

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New York, N. Y.

HENRY LANDAU,
On Brief.

INDEX.

CITATIONS:

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN NO. 11 AND FOR THE PETITIONER IN NO. 15.

Opinion Below.

The opinion of the Court of Appeals for the Second Circuit (R. 17-24) is reported at 169 F. 2d 932. The District Court rendered no opinion.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on August 5, 1948 (R. 24). Cross-petitions for writs of certiorari were filed by the Solicitor General, on behalf of the Attorney General, as successor to the Alien Property Custodian,[1] on October 29, 1948, and by Manufacturers Trust Company on December 2, 1948. Both petitions were denied on January 17, 1949. The Solicitor General, on behalf of the Attorney General, filed a petition for rehearing on June 16, 1949. In its petition filed June 22, 1949 Manufacturers Trust Company asked that, if the Attorney General's petition for rehearing should be granted, rehearing be granted also of the denial of Manufacturers Trust Company's petition for writ of certiorari. On June 27, 1949 both petitions for rehearing were granted, the orders denying certiorari were vacated, and certiorari was granted in both cases.

The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of the United States Code.

Statutes Involved.

Secs. 5 (b), 7 (c) and 8 (a) of the Trading with the Enemy Act as amended, are set forth in the appendix of Custodian's brief (pp. 44 to 47). Sec. 17 of said Act is set forth in the appendix, *infra*, page 29.

[1] In this brief the term "Custodian" will be used to refer to either the Alien Property Custodian or the Attorney General as his successor.

Summary Statement.

On October 31, 1941 Manufacturers Trust Company (hereinafter called "the Bank") filed a report with the Treasury Department that as of June 14, 1941, the sum of $39,589 stood to the credit of Reichsbank Direktorium (hereinafter called the "Reichsbank") (R. 5). In the said report the Bank also stated erroneously that on June 1, 1940, as well as on June 14, 1941, the Reichsbank was not indebted to it and that no adverse claims existed or were asserted with respect to the aforementioned indebtedness (R. 6).

On February 1, 1946 the Custodian issued Vesting Order No. 5791 vesting the interest of the Reichsbank in the indebtedness arising out of the dollar account maintained by the Reichsbank with the Bank and any and all rights to demand, enforce, and collect the same. The vesting order made no demand for payment but provided that the vested property should be held pending further determination by the Custodian (R. 7, 8).

Upon receipt of a copy of Vesting Order No. 5791, the Bank, in its letter dated April 8, 1946, advised the Custodian that, as it previously informed his representative, while the sum of $25,581.49 stood to the credit of the Reichsbank's account with the Bank, the Reichsbank was indebted to the Bank in a sum far in excess of said balance on an obligation long past due, and that, therefore, there was no credit balance available to the Reichsbank (R. 9).

On January 30, 1947 the Custodian issued a turnover directive in which he determined that at the

time of the issuance of the vesting order, the Bank was indebted to the Reichsbank in the sum of $25,581.49; that there were no valid offsets or counterclaims thereto; and that the said sum is property which is in the possession of the Bank and which was vested by Vesting Order No. 5791, and demanded that the Bank turn over the said property to the Custodian (R. 9-11).

On October 29, 1947, on the petition of the Custodian, the District Court ordered the Bank to show cause why an order should not be made directing the Bank to comply with Vesting Order No. 5791 and demands based thereon (R. 2). In its answer to the petition, the Bank alleged that the Reichsbank was an instrumentality and part of the German Government which had guaranteed to the Bank payment of debts of various German banks to the Bank; that on June 14, 1941 the indebtedness of the said banks to the Bank was in excess of $25,581.49 and that, therefore, on the date of the issuance of the vesting order the Bank was not indebted to the Reichsbank in the sum of $25,581.49 or any other sum (R. 12-14).

On December 12, 1947 the District Court of the United States for the Southern District of New York (Coxe, *J.*) directed the Bank to pay $25,581.49, with interest at six per cent from the date of the service of the turnover directive (R. 15). On appeal by the Bank, the Court of Appeals for the Second Circuit unanimously affirmed the order of the District Court insofar as it directed payment of $25,581.49, but the majority (Swan and Frank, *JJ.*) held that the Custodian was entitled to interest only from the date on which the District Court entered its order (R.

17-24). In the opinion, Swan, *J.*, stated that the consequences of giving the Custodian the power to call property into existence for the purpose of seizure by his own *ex parte* action are exceedingly drastic and that if a putative debtor denies the existence of any debt whatever, the Court would hesitate to hold that the Custodian's power extends so far as to make his *ex parte* determination that there is a debt and the amount of it conclusive in a proceeding under Sec. 17 of the Trading with the Enemy Act (hereinafter referred to as the "Act"). The affirmance, however, was based upon the holding that the set-off claim of the Bank was not a denial of the Reichsbank's claim for the amount of its deposit but the assertion of an independent claim which should be litigated in a proceeding instituted under Sec. 9 of the Act (R. 21, 22).

In No. 11 the Custodian has petitioned to review the decision of the Court of Appeals insofar as it reversed the decision of the District Court and denied the Custodian's claim to interest prior to the entry of the District Court order. In No. 15 the Bank has petitioned to review the decision of the Court of Appeals insofar as it affirmed the decision of the District Court and directed immediate payment to the Custodian of the principal sum demanded.

Questions Presented.

The following questions are presented:

1. Whether the Custodian who vested an enemy's interest in a debt claimed to be due to the enemy can, by his own action, determine the existence and amount of the debt notwithstanding the alleged debtor's de-

nial of the existence of any debt to the enemy, and summarily enforce payment of the amount so found by him to be due to the enemy.

2. Whether, in a proceeding under Paragraph 17 of the Act, the Custodian's determination as to the existence and amount of a disputed debt is conclusive.

3. Whether the Bank's right of set-off of the depositor's matured indebtedness to it in excess of the deposit balance, extinguishes the Bank's indebtedness to the depositor for the deposit balance and makes the deposit balance unavailable to the depositor and to the Custodian as the successor of the depositor's interest in the deposit balance.

4. Whether Sec. 8 (a) of the Act protects a lienor's possession of property subject to lien against seizure by the Custodian.

5. Whether the Bank's right to hold and apply a deposit balance in payment of a depositor's indebtedness to it is a right in the nature of a security interest in property within the purview of Sec. 8 (a) of the Act.

6. Whether the Custodian is entitled to interest from the date of the service of the turnover directive.

Specifications of Error.

The Bank having denied the existence of any indebtedness to the Reichsbank at the time of the issuance of the vesting order, the Custodian could not summarily enforce payment of the debt claimed by him to be owing to the Reichsbank without first establishing the existence and amount of the debt in a sepa-

rate proceeding. The District Court had no summary power to direct payment of the disputed debt and the affirmance of that part of its order by the Court of Appeals for the Second Circuit was erroneous.

Summary of Argument.

In this action the Custodian seeks summarily to compel payment of a debt which he determined to be owing to an enemy, the existence of which is denied by the alleged debtor. By the issuance of the vesting order the Custodian seized the debt which the Bank owed the Reichsbank, if any. The Custodian has no greater right than the enemy depositor to demand repayment of the deposit balance allegedly due to the depositor and to enforce payment thereof. If the balance was unavailable to the Reichsbank upon the demand, it was likewise unavailable to the Custodian.

The Bank at no time held any moneys of the depositor. The Bank was a debtor of the Reichsbank for the amount of the deposit balance and the Reichsbank, in turn, was a debtor of the Bank as a guarantor of payment of a matured indebtedness. A banker's right to hold and apply a deposit balance in satisfaction of a depositor's past due obligation is a substantial right which may be enforced without the aid of the Court.

While in its report to the Treasury Department the Bank originally reported that the Reichsbank was not indebted to it, it subsequently advised the Custodian of its error. A report made to the Government is not conclusive and does not preclude the person making the report from showing the true facts.

In this proceeding the Custodian is not seeking to compel delivery of a chattel but to compel payment of

a debt and the many decisions which hold that the Custodian has the power to summarily compel delivery of property determined by him to be held for an enemy are inapplicable. A summary enforcement of a debt allegedly due to an enemy is, in effect, a levy upon the putative debtor's property for the satisfaction of the alleged debt. The Custodian may summarily enforce payment of an acknowledged debt to an enemy. However, if a debt is disputed, the Custodian may not lawfully compel the application of property of the putative debtor to the satisfaction of the claimed debt without first establishing the existence and the amount of the debt.

The Custodian's erroneous seizure of a putative debtor's property for the satisfaction of a debt allegedly due to an enemy is not remediable under Sec. 9 of the Act.

In a summary proceeding instituted by the Custodian under Sec. 17 of the Act to compel delivery of property, respondent has a right to show that he does not have the property. Similarly, in a proceeding to compel payment of a debt allegedly due to an enemy, the alleged debtor also has a right to challenge the Custodian's determination as to the existence of the debt and to show that by reason of a set-off of mutual debits and credits he is not indebted to the enemy.

The Bank can also resist the issuance of an order directing it to comply with the Custodian's demand by invoking Sec. 8 (a) of the Act, which protects the right of possession of a person having a right in the nature of security in the property of an enemy. A bank's right to hold a deposit balance for application against any matured indebtedness is in the nature of a lien for the security and protection of the bank.

The Custodian is not entitled to interest between the date of the issuance of the turnover order and the entry of a judgment in this proceeding. The proceeding under Sec. 17 of the Act is not a proceeding to enforce payment of an obligation due to the United States but to obtain possession of enemy property. At the time of the entry of the judgment directing the Bank to comply with the Custodian's demand, the Custodian was merely authorized to hold the enemy property seized by him pending further determination by Congress of the use to be made thereof. Interest should, therefore, not be exacted to compensate the Custodian for the loss of use of the amount ordered to be paid. The Act makes no provision for payment of interest or any other penalty in the event of noncompliance with the Custodian's demand. The Custodian is not entitled to interest by way of penalty for noncompliance, particularly since the Bank's refusal to comply with the demand was not capricious.

POINT I.

Upon vesting of an enemy's title and right to a debt, the Custodian cannot summarily compel payment of the amount claimed by him to be due to the enemy if the existence of the indebtedness is disputed by the putative debtor.

Secs. 5 and 7 of the Act empower the Custodian to vest any property, including debts.

Sec. 17 of the Act[2] confers jurisdiction upon District Courts of the United States to enforce the Act by the issuance of such orders and decrees as may be

[2] Appendix, p. 29.

necessary. The said section did not confer upon the Custodian the right to institute summary proceedings in all instances. The circumstances of a particular case determine whether the Custodian should resort to a summary proceeding or a plenary suit.

By the issuance of Vesting Order No. 5791, the Custodian captured whatever right the Reichsbank had to demand from the Bank payment of the deposit balance. The vesting order had the legal effect of transferring to the Custodian the interest and right of the enemy as they then existed.

The Bank at first erroneously reported to the Treasury Department that a deposit balance in the sum of $39,589 stood to the Reichsbank's credit with it and that the Reichsbank was not indebted to it. Subsequently, in a statement made to the Custodian's representative and in its letter to the Custodian dated April 8, 1946 and in its answer in this proceeding the Bank denied that, as of the date of the vesting order, it was indebted to the Reichsbank in any sum whatever. In its letter dated April 8, 1946 the Bank stated that while it was indebted to the Reichsbank in the sum of $25,581.49, the Reichsbank was indebted to it on a past due obligation in excess of said sum and that, therefore, there was no balance available to the Reichsbank nor in turn to the Custodian (R. 9).

In its answer in this proceeding (R. 14) the Bank stated that on June 14, 1941, the principal obligors were indebted to the Bank in excess of the amount of the Reichsbank's deposit balance and hence the Reichsbank's obligation as guarantor of said obligations was in existence on said date.

A report or a statement made to the Government is not conclusive and does not preclude the person

making the report from showing the true facts (*Schall* v. *Miller*, 287 Fed. 502; *Simon* v. *Miller*, 298 Fed. 520).

The Custodian could not have been prejudiced by the Bank's report to the Treasury Department. This summary proceeding is based upon the Custodian's determination that the Bank was indebted to the Reichsbank in the sum of $25,581.49. Obviously, this determination was not made on the basis of the report filed by the Bank with the Treasury Department but on the Bank's statement in its letter of April 8, 1946 that the Bank was indebted to the Reichsbank in the sum of $25,581.49. However, in the very same letter the Bank advised the Custodian that the deposit balance was not available to the Reichsbank and that it was not indebted to the Reichsbank in any sum whatever because the Reichsbank was indebted to the Bank on a past due obligation in a much larger sum.

Despite the Bank's denial of any indebtedness to the Reichsbank, the Custodian seeks summarily to compel payment of a debt which he determined to be due to the enemy.

The Act only grants to the Custodian the power to seize an existing debt and to compel its payment upon the determination that it is owing to an enemy. The Act does not, however, empower the Custodian to determine conclusively the existence and extent of the debt for the purpose of compelling its payment by the putative debtor.

There is a difference between vesting and obtaining delivery of tangible property and the vesting and enforcing of payment of a debt. The vesting of tangible property determined to be enemy-owned is a seizure

of such property and the Custodian may summarily compel delivery of the enemy property. The vesting of a debt is in the nature of a garnishment and the summary proceeding to compel satisfaction of the debt alleged to be garnished is a proceeding to enforce payment out of non-enemy property (*Simon* v. *Miller*, 298 Fed. 520).

If the debt is admitted, no reason exists why the Custodian should not have the power to initiate a summary proceeding to compel its payment. However, if the debt is disputed, the Custodian may not resort to a summary proceeding to compel payment of the debt alleged by him to be due to the enemy. He may either establish the existence and extent of the debt in a separate proceeding and then summarily enforce its payment or he may institute a plenary action under Sec. 17 of the Act both to establish the debt and compel payment thereof by appropriate decree.

At page 9 of his brief, the Custodian admits that in many cases he is content to permit an adjudication of the title and interest of the enemy prior to reduction of the property to possession. Such prior adjudication should be obtained by the Custodian in all cases where the debt is disputed.

In *Simon* v. *Miller*, *supra*, even as here, the Custodian argued that he had the power to state the account between the alleged debtor and the enemy and compel payment of the balance found by him to be due. The Custodian argued that if, in fact, he had power to demand delivery of chattels whether or not they were enemy owned, it would be no more drastic to compel payment of a balance resulting from an

account stated by the Custodian. Judge Learned Hand answered this argument as follows (p. 523):

> "The consequences of such a power are excessively drastic, and would indeed be extravagant in operation. The Custodian might, in the case of the breach of a contract for the sale of goods or for their manufacture, undertake a liquidation of damages which, however honest, would have no relation to what should eventually be recovered. How could such a finding be enforced? The debtor must collect money to pay it, and if he had none, must sell his goods till he got in hand the necessary cash. That is in fact execution *in limine*, a loss scarcely remediable by suit under section 9. It contradicts all our notions of the rights of putative debtors who dispute the debt; it has no analogy in those possessory suits on which reliance was put, in part anyway, in *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. 403. Rather one would look to the common procedure in garnishment, by which a discharge of the debt is paralyzed, and the asset effectively sequestered, until any controversy as to its existence or amount can be determined.

Nor does it seem to me that any such interpretation is called for by the general purposes of the legislation in question. Captures had a double purpose. They changed the title in any actual rights which the enemy might have in the captured property, and they sequestered the property itself in which those rights might inhere. The plaintiff concedes that the demand of June 1, 1920, gave title to the Custodian to all Albert's

rights to the account; he disputes, however, that after the Custodian's statement of the account his individual assets might be sequestered to pay the balance found. The summary power to sequester property depends upon the protection necessary to secure the United States in the assertion of its eventual right by capture; the property must be held in custody until any disputes shall be determined, just as is done in replevin or attachment. In the case of chattels or tenements this involves possession *ad interim* of the property itself, since otherwise the chattel might be delivered or the profits collected and disbursed. That would make ineffectual any final decree of title.

But these considerations cannot apply to the capture of a debt. A creditor has no rights in his debtor's assets and is not concerned with their fate. The debt remains a general obligation, regardless of their disposition. Whatever makes invalid any payment by the debtor protects the captor of the debt. No possession is necessary, because none is possible; the captor is secure so long as the debtor cannot discharge the debt. How, then, can it be argued that the scheme of the act involved a payment of the debt *in praesenti?* The captor being protected, why must the debtor be exposed to execution *in limine?*"

Although *Simon* v. *Miller* was an action pursuant to Sec. 9 of the Act, the instant case is indistinguishable in principle. Simon at first reported that a balance standing to his credit with the bank represented moneys which he owed to an enemy. However,

he later declared that his prior report was made through error and that the said balance did not represent his balance to the enemy because the enemy was indebted to him in a sum in excess thereof. The Custodian did not obtain the amount claimed to be the enemy's from Simon but obtained it from the bank where it was on deposit to Simon's credit. Simon had no opportunity to resist the Custodian's capture and had to resort to a proceeding under Sec. 9 of the Act to obtain restitution. Learned Hand, *J.*, held that the proceeding instituted by Simon was analogous to an application to vacate an attachment improperly levied; that the power of the Custodian did not extend beyond the right to attach the enemy's claim and did not include the right to state an account and to compel payment of the balance found by him; that, accordingly, the seizure was unauthorized and unlawful; that while the plaintiff's change of position as to the balance due was a suspicious circumstance, nevertheless it could not subject plaintiff to summary execution upon its obligation, and directed the Custodian to pay the seized amount to plaintiff.

Grave injustice may stem from the grant of such extravagant and unnecessary power and in many cases the exercise thereof would not be remediable, *Clark* v. *E. J. Lavino & Co.*, 72 F. Supp. 497, to the contrary notwithstanding. The Court below stated that it would "hesitate to hold that the Custodian's power extends so far as to make his *ex parte* determination that there is a debt and the amount of it conclusive in the proceeding under Section 17" (R. 21) and that "the consequences of giving the Custodian such a power are exceedingly drastic". (R. 20).

The Custodian admits that if the debtor does not in fact have the cash demanded, severe hardship might result from a summary enforcement of his demand, but states that the possibility of such hardship would unquestionably be taken into consideration by the Custodian in considering whether resort to summary proceeding was appropriate (Custodian's Br. 15).

Such wide discretionary power should not be granted to the Custodian where there is no real need for it. He should be compelled in all cases where the debt is disputed to resort to a plenary action for the purpose of establishing the existence and the extent of the debt before compelling payment thereof. The Custodian rests his claim to such extravagant power upon the imperative necessities involved in the exercise of his war power. No imperative necessity exists here. The deposit balance was not available to the enemy after June 14, 1941, the date of issuance of Executive Order 8389 which prohibited transfer of property of a German national without a license. The vesting order was issued on February 1, 1946. The turnover directive which contained a demand for payment was not issued by the Custodian until January 30, 1947, after the cessation of hostilities. The proceeding under Sec. 17 was not instituted until October 29, 1947.

In this proceeding the Bank is not asserting an adverse claim to property seized by the Custodian. It is merely asserting that an order may not be issued directing the Bank to pay a debt which, in effect, did not exist.

The Custodian contends that this is a proceeding to enforce a demand for possession of vested property. At the time of the issuance of the vesting order and of the turnover directive, the Bank did not have in

its possession any moneys or other tangible property which it held for the Reichsbank. Title to any money deposited in a bank account passes to the bank and the relationship becomes one of debtor and creditor (*New York County National Bank v. Massey*, 192 U. S. 138, 145; *Straus, et al. v. The Tradesmen's National Bank of New York*, 122 N. Y. 379, 382).

In *United States v. Bank of United States*, 5 F. Supp. 942 (S. D. N. Y.), the Commissioner of Internal Revenue, having previously made a levy upon a deposit balance allegedly due to a delinquent taxpayer, instituted a proceeding to compel payment of the deposit balance. Woolsey, *J.*, held that since at the time of the levy the depositor was indebted to the Bank on a past due obligation in excess of the amount of such balance, "the result of this is that there really was not any chose in action in existence on which the Government could levy because there was nothing owing from the bank".

Even in a summary proceeding for delivery of tangible property, the alleged holder of the property will be heard to say that an order should not be issued because at the time of the vesting order he did not have the property in his possession.

POINT II.

The Reichsbank's deposit balance was not available or payable to the Reichsbank nor to the Custodian as the captor of the Reichsbank's rights.

A deposit in a bank creates a debtor and creditor relationship between the bank and its depositor. The bank may, at will, apply the deposit balance upon any obligation then due it from the depositor.

Studley v. *Boylston Nat. Bank of Boston*, 229 U. S. 523;
Straus et al. v. *The Tradesmen's National Bank of New York*, 122 N. Y. 379;
Falkland v. *St. Nicholas Nat. Bank of New York*, 84 N. Y. 145, 149.

While some courts have held the contrary view, many jurisdictions, including New York, hold that a deposit balance may be off-set against a matured debt of a depositor which, though originally contingent had become absolute at the time of the application of the balance.

Davis v. *Standard National Bank*, 50 App. Div. 210, 212;
New York Title & Mortgage Co. v. *Irving Trust Co.*, 241 App. Div. 246, aff'd 268 N. Y. 547;
Van Schaick v. *Pennsylvania Exchange Bank*, 236 App. Div. 453;
Citizens National Bank v. *Wills*, 130 N. J. L. 201, 31 A. 2d 820;

Page Trust Company v. *Wachovia Bank & Trust*, 188 N. C. 766, 125 S. E. 536;
Millhouse v. *Citizens Bank of Valdosta*, 14 Ga. App. 240, 80 S. E. 703;
Munday v. *Bank of Franklin*, 211 N. C. 276, 189 S. E. 779;
7 *Zollman, Banks and Banking*, §4590, at p. 176;
5 *Michie, Banks and Banking*, p. 247;
37 A. L. R. 578;
7 *Amer. Juris. Banks*, §645.

In *Wills* v. *Citizens National Bank*, 125 N. J. L. 546, 16 A. 2d 804, cited at page 19 of Custodian's Brief, the bank was not permitted to set off the deposit balance against the depositor's liability as endorser of the note which had not yet been fixed by protest, but in the later decision, *Citizens National Bank* v. *Wills*, *supra*, the set-off was upheld once the liability had been so fixed.

In *Long Island Bank* v. *Townsend*, Hill & D. Supp. 204 (N. Y.), the only New York case cited by the Custodian (Custodian's Br. 19), the set-off was denied because the bank sought to apply the deposit balance of one of two joint obligors, hence mutuality was lacking.

On June 14, 1941, the obligations of the principal obligors were past due and the Reichsbank's obligation to the Bank was absolute.

The Custodian argues that the Reichsbank was not a part of the German Government and that therefore it was not in effect the guarantor. The Bank's allegation that the Reichsbank is an instrumentality of the

German Government was not controverted by any proof offered in the District Court and is not an issue in this proceeding. That would have been one of the main issues in the plenary suit which the Custodian should have instituted.

The crucial phrase in the majority opinion of the Court of Appeals insofar as the present controversy is concerned is that "a set-off at law is a money demand independent of and unconnected with the plaintiff's cause of action", that the "assertion by the Bank of a right of set-off is not a denial of the Reichsbank's claim for the amount of its deposit", and that the Bank "must have recourse to Sec. 9 to litigate its asserted right of set-off" (R. 32).

The decision of the Court below was contrary to the modern view of the Bank's right of set-off as understood by the commercial community and by the courts.

According to the modern view, a bank's right of set-off is a matter of substantive right and not procedure. *First National Bank of Indianola* v. *Malone*, 76 F. 2d 251.

This right is not limited in its exercise to the pleading of a counterclaim in an action but is enforceable by the bank's own act without the aid of a court. *Studley* v. *Boylston Nat. Bank of Boston*, 229 U. S. 523; *Gonsalves* v. *Bank of America National Trust and Savings Association*, 16 Cal. 2d 169, 105 P. 2d 118; *Jefferson County National Bank* v. *Dauskas*, 166 Misc. 720.

The practical effect of a set-off arising from the existence of mutual demands is the satisfaction and

extinguishment of the cross demands, leaving only the resulting balance as the true amount of the indebtedness from the one party to the other. *Bank of Marysville* v. *Marysville Windisch Mulhauser Brewing Co.*, 50 Ohio State 151, 33 N. E. 1054; *Long Beach Trust Co.* v. *Warshaw*, 264 N. Y. 331; *Commercial Bank of Albany* v. *Hughes*, 17 Wended 94; *Ware, as Administrator* v. *Hawley*, 68 Ia. 63, 27 N. W. 788, 789.

If the depositor is, in fact, indebted to a bank, the bank may exercise its right of set-off; that the transaction is not on the books of the bank or that an official of the bank does not know of its existence is immaterial on the issue of the indebtedness. *Walser* v. *International Union Bank*, 21 F. 2d 294, 296.

When the Court of Appeals stated that the assertion by the Bank of a right of set-off is not a denial of the Reichsbank's claim and that the Bank should litigate its right of set-off in the proceeding brought under Sec. 9 to obtain a return of the moneys paid to the Custodian, it took an inconsistent position.

Restitution in a Sec. 9 proceeding can be had only upon a showing that the Custodian seized the Bank's own funds. This presupposes that the Bank had the right to set-off the Reichsbank's deposit balance and that the assertion of the right of set-off is a denial of the indebtedness to the Reichsbank. On the other hand, if the claimed set-off of the Bank is merely an independent claim in the nature of a counterclaim, then the assertion of that right would not constitute a basis for obtaining repayment of the moneys paid to the Custodian in a Sec. 9 proceeding and relegating the Bank to a Sec. 9 proceeding affords the Bank no relief.

The Courts have at all times been solicitous in protecting the banks' rights of set-off. In no other proceeding has a bank been compelled to pay a deposit balance and to litigate its right of set-off thereafter.

POINT III.

The Bank's security interest in the Reichsbank's deposit balance is exempt from seizure by Section 8 (a) of the Act.

Sec. 8 (a) (p. 46, Custodian's Br.) provides that any person not an enemy or an ally of an enemy holding a right in the nature of security in the property of an enemy which may be disposed of on notice or presentation or demand may continue to hold the said property and after default may dispose thereof in accordance with law and that where the demand is a prerequisite to the liquidation of the property said demand may be made upon the Custodian.

When language of a statute is clear, as this is, no evidence of legislative intention can control its construction. *Cammanetti v. United States*, 242 U. S. 470; *R. R. Commission v. Chicago B. & O. R. Co.*, 257 U. S. 563.

The purpose of this Section is twofold, one, to protect a lienor's possession, and, two, to perfect the lienor's right to liquidate the property subject to lien despite the inaccessibility of the debtor.

There is no anomaly between the provisions of Sec. 8 (a) and Secs. 5 and 7 of the Act. By vesting enemy property which is subject to a lien the Custo-

dian does not seize the property but only the equity of the lienee. The vesting order prevents the use of the property by the enemy. The Act is not intended to interfere with rights of non-enemies. Neither the lienor, nor the Custodian as a successor to the lienor's rights may interfere with the right of the lienor to realize the debt out of the property.

In *Silesian American Corporation* v. *Markham*, 156 F. 2d 793, 797, Learned Hand, *C. J.*, stated that Sec. 8 (a) protects an American pledgee against seizure of the pledged property and forbids the disturbance of the pledgee's possession by the Custodian.

The protection afforded by Sec. 8 (a) is not confined to mortgages, pledges or similar liens but to any security interest in the enemy's property.

In *Mayer* v. *Garvan*, 270 F. 229, an American partner of an enemy asserted that he had a right to retain the partnership assets for the satisfaction of his interest in the partnership. Bingham, *C. J.*, held that the American partner had a partner's lien on the partnership assets after the payment of partnership liabilities and stated at page 239:

> "His (Custodian's) right of seizure did not extend to dispossessing the plaintiff of the American assets, for Section 8 (a) of the act entitled the plaintiff to continue to hold the property and to liquidate the same to satisfy his interests and to pay over the surplus or what belonged to the enemy partners to the custodian."

In *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656, 665, it was held that an agent has a right to retain property of his principal of which he gained pos-

session in the execution of the agency, that "such a valid acquired lien is effective against the United States and the Custodian".

The Custodian concedes that the claimed right of set-off would give the Bank a right to withhold payment of the deposit balance (p. 31).

Under New York decisions a bank has a lien on the deposit balance. *Falkland* v. *St. Nicholas National Bank of New York*, 84 N. Y. 145, 149; *Delehanty* v. *Central National Bank*, 63 App. Div. 177.

In *Wright* v. *Seaboard Oil & Manganese Corporation*, 272 F. 807, the Court of Appeals, Second Circuit, recognized that a bank has a lien on a deposit balance and stated that "it makes no difference whether the lien has its origin in the contract or arises by operation of law."

Some courts state that the bank's right to hold and apply its depositor's deposit balance is a lien. Other courts call it a pledge (*In re Estate of Browning*, 189 Minn. 375), collateral security (*Fisher* v. *Continental Bank*, 64 F. 707; *Brown* v. *Maguire's Real Estate Agency*, 343 Mo. 326), assignment of a chose in action as collateral (*Marion National Bank* v. *Smith*, 170 Ga. 332). Irrespective of what that right is called, the courts have been solicitous in protecting the bank's right to control the deposit balance for the purpose of set-off and they recognize that a bank has a security interest in the balance.

In *Gonsalves* v. *Bank of America Nat. Trust & Sav. Ass'n.*, 16 Cal. 2d 169, 105 Pac. 2d 118, referring to a banker's lien, the Court stated at page 12:

"Despite the technical inaccuracy involved in

calling it a lien, it is in the nature of a lien or security interest in the funds, similar to and enforceable in the same way as the lien against commercial paper."

The contention of the Custodian and the Court of Appeals, that one cannot have a lien on his own property, is misleading and beside the point. Security rights are not claimed in the money deposited, which has already become the property of the Bank, but in the depositor's ownership and right of disposition of the deposit. A deposit creates a chose in action in favor of the depositor which may be assigned voluntarily or *in invitum*. It is upon that chose in action that the Bank has its lien.

It is evident from the plain language of Sec. 8 (a) that it was the intent of Congress not to impair the subsequent rights of creditors having any interest in the property sought to be seized by the Custodian.

No valid reason exists for the Custodian's seizure of property subject to a non-enemy security interest.

POINT IV.

The Custodian is not entitled to interest from the date of demand until the date of the order directing the Bank to make payment.

The Act makes no provision for payment of interest or for penalties for non-compliance. The decisions cited by the Custodian in support of his contention that he is entitled to interest are not in point. Those

cases merely hold that any obligation to the United States bears interest from the date such obligation became due, even if the statute creating the obligation makes no provision for interest.

If a statute creates an obligation to the United States, interest will be awarded even though the statute is silent on the subject, providing the allowance thereof would be equitable. *Rodgers* v. *United States*, 332 U. S. 371.

In *Billings* v. *United States*, 232 U. S. 261, it was held that interest is recoverable on taxes which have been illegally withheld because the government is entitled to the immediate use of the money and, also, because an aggrieved taxpayer, who sues to recover the taxes which have been illegally exacted, may recover interest from the time of payment to the United States.

Should the Bank succeed in a Sec. 9 proceeding, it will not receive interest from the time of payment until the time of restitution. *Pfluger* v. *United States*, 121 F. 2d 732.

As was pointed out by the lower Court, this is not a proceeding to recover an obligation due to the United States, but to obtain payment of a disputed debt allegedly due to the enemy, and if the Bank was to succeed in a Sec. 9 suit in establishing its claim of set-off, the Custodian would have to return what he collected (R. 23).

The Custodian concedes that this proceeding is of a possessory character and that it does not adjudicate the rights of the Custodian or of the Bank.

Sec. 9 (a) of the Act provides that upon the institution of a suit for the recovery of moneys paid to the Custodian, such moneys shall be retained until a final judgment or decree is entered in said action.

The Custodian is, therefore, not entitled to interest between the date of his demand and the date of the order of the District Court as compensation for being deprived of the use of the moneys. Furthermore, at the time of the issuance of the turnover directive and the entry of the order directing payment (December 12, 1947), Congress had not, as yet, directed what use was to be made of the seized enemy property.

Prior to July 3, 1948 the seized property was to be merely held by the Custodian. On July 3, 1948 the Act was amended to provide that vested German and Japanese property shall not be returned to its former owners nor compensation be paid to them, but that the net proceeds of such property shall be paid into the Treasury (P. L. 896, 80th Congress, Second Session, July 3, 1948, Par. 12).

The vesting by the Custodian under the Act is tantamount to confiscation of the property of the enemy but such vesting is not a confiscation of the property rights of citizens (*Henkel* v. *Sutherland*, 271 U. S. 298).

In the instant case the Bank refused to comply with the Custodian's demand in reliance upon *Simon* v. *Miller*, *supra*.

In the absence of a statutory provision for a fine or penalty for non-compliance with the Custodian's demand, interest should not be awarded for non-compliance, if there is a reasonable ground therefor.

It has been held that, even where a statute provides for the awarding of interest where money is "withheld by unreasonable and vexatious delay of payment", interest will not be allowed if the debtor raised a plausible defense (*Adler v. Consumers Co.*, 152 F. 2d 696).

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the cause remanded with directions to deny the Custodian's petition for an order directing the Bank to pay him the sum of $25,581.49 and to dismiss this proceeding.

Respectfully submitted,

LEONARD G. BISCO,
Attorney for Respondent in No. 11 and Petitioner in No. 15,
29 Broadway,
New York, N. Y.

HENRY LANDAU,
On Brief.

APPENDIX.

Trading with the Enemy Act, c. 106, 40 Stat. 411 (50 U. S. C. App. 156):

SEC. 17. [40 Stat. 425] The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary"

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 386

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

MANUFACTURERS TRUST COMPANY

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

The Solicitor General respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the Government's petition for writ of certiorari in this case, entered on January 17, 1949. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the decision of the Court of Appeals for the Third Circuit in *Clark* v. *E. J. Lavino & Co.*, filed June 1, 1949, is in direct conflict with that of the Court of Appeals for the Second Circuit in this case, and thus has created a conflict of decisions in the Courts of Appeals which should be resolved by this Court. Although this petition

for rehearing is filed after the expiration of the time prescribed in Rule 33, the grounds upon which it is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition. *Roberts Sash & Door Co.* v. *United States*, 282 U. S. 829; *Duquesne Steel Foundry Co.* v. *Burnet*, 282 U. S. 830; *Douglas* v. *Willcuts*, 295 U. S. 722; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 474; see *R. Simpson & Company* v. *C. I. R.*, 321 U. S. 225, 229.

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1949.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 386

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

MANUFACTURERS TRUST COMPANY

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General on behalf of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, prays that this Court grant rehearing of its order of January 17, 1949, denying the Government's petition for writ of certiorari, 335 U. S. 910, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition filed October 29, 1948, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of January 17, 1949, there was no conflict of decisions on the question sought to be reviewed. Since that time, a direct and explicit conflict has arisen. On June 1, 1949, the Court of Appeals for the Third Circuit

announced its unanimous decision in *Clark* v. *E. J. Lavino & Co.*, reversing on this point the decision of the District Court for the Eastern District of Pennsylvania, referred to on page 10 of the petition for writ of certiorari previously filed herein. (A copy of the opinion of the Court of Appeals for the Third Circuit is appended hereto.)

In the *Lavino* case, as in the present case, the Custodian, determining that a debt was owing to an enemy, vested that debt and subsequently issued a turnover directive demanding that a stated sum be paid over to him. As here, the debtor refused, asserting that it was entitled to a set-off. In both cases, judgment was entered requiring the debtor to pay over the sum demanded, leaving him to assert the claimed set-off in subsequent proceedings. The Courts of Appeals have, however, disagreed on the question, presented by the petition herein, whether the Custodian is entitled to interest on the sum demanded from the date of service of his directive. The Court of Appeals for the Third Circuit has held that the debtor "had an immediate duty to comply" (App. p. 12) with the turnover directive without resort to litigation, and that the Custodian was entitled to interest as damages for any delay in compliance. In so holding, the Third Circuit expressly recognized that the decision of the Second Circuit in the instant case was to the contrary. It said:

> In Clark v. Manufacturers Trust Co., *supra, under circumstances analogous to those at bar*

> the Court of Appeals for the Second Circuit held, one judge dissenting, that there is "* * * no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment." *We cannot agree.* Although Congress did not deal with interest in the Act the absence of an express provision respecting it does not preclude its award. [App., pp. 10-11] [Emphasis added.]

And it cited with approval the dissenting opinion of Judge Clark in the instant case (App., p. 12).

The Custodian and persons to whom his turnover directives are addressed are thus confronted with squarely opposing holdings on the question of the allowability of interest as damages for delay in compliance with such a directive. Unless that conflict is resolved, an unjustifiable discrimination between persons in different jurisdictions will result.

2. The question continues to be one of large practical importance in the administration of the Trading With the Enemy Act.[1] Turnover directives involving substantial sums of money—often far greater than that involved in the instant case—have been and will continue to be issued by the Custodian. To deny the Custodian any compensation for the unlawful withholding of money de-

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[1] In addition to the cases referred to in the petition for writ of certiorari heretofore filed, the question has arisen also in *Clark* v. *Douthitt, et al.* (S.D.N.Y., Civil No. 36-196, now pending).

manded by him, and to permit the holder to continue to have the use of that money without charge during the period of unlawful detention, would, in the words of the Third Circuit, "place a premium upon disobedience to the mandate of the statute and reward the recalcitrant" (App., p. 12). Such encouragement of dilatory tactics would be totally inconsistent with the Act's purpose to ensure the speedy reduction to possession of enemy property without the delays of litigation. Cf. *Central Trust Co.* v. *Garvan*, 254 U. S. 554; *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, 798 (C. A. 2), affirmed, *sub nom. Silesian-American Corp.* v. *Clark*, 332 U. S. 469.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

PHILIP B. PERLMAN,
Solicitor General.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 9709.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, APPELLANT,

v.

E. J. LAVINO & COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued February 7, 1949.

Before BIGGS, *Chief Judge*, and O'CONNELL and KALODNER, *Circuit Judges*.

OPINION OF THE COURT—Filed June 1, 1949.

By BIGGS, *Chief Judge*.

The Attorney General, the Honorable Tom C. Clark, as successor[2] to the Alien Property Custodian, has appealed from the judgment of the court below directing E. J. Lavino & Company ("Lavino") to turn over and deliver to the Custodian the sum of $25,000, insofar as the judgment failed to award interest.[3]

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[2] By Executive Order No. 9788, effective October 15, 1946, 11 F. R. 11981 the Attorney General succeeded to the powers and duties of the Alien Property Custodian. For the purpose of convenience we shall employ the term "Custodian" as referring either to the Alien Property Custodian or to the Attorney General.

[3] Though the turnover directive required Lavino to turn over the ". . . property with all dividends, accumulations and increment thereon . . .", there is no showing that the fund received any accumulations or increment or that Lavino received any dividends. The notice of appeal raises but one question: *viz.*, the failure to award interest in the judgment

In July, 1941 Lavino became indebted to Kawasaki Kisen Kaisha, Ltd. ("Kawasaki"), a Japanese shipping corporation, for $72,753.27, the sum representing freight charges for the carriage of freight in one of the latter's vessels. Lavino paid Kawasaki $47,753.27 but retained $25,000, claiming this amount as a set-off against damages which Lavino asserted it sustained because of Kawasaki's breach of a prior contract in failing to deliver to Lavino a shipment of chrome ore, whereby, Lavino alleges, it was damaged to the extent of $24,759.

On July 30, 1942 the Custodian, having determined that Kawasaki was an enemy national within the meaning of the Trading with the Enemy Act, 50 U. S. C. A. Appendix, Section 1 *et seq.*, issued two vesting orders, No. 77 and No. 80, by virtue of which all property of any nature whatsoever owned or controlled by, payable or deliverable to Kawasaki Kisen Kaisha, Ltd. and to Kawasaki Kisen Kabushiki Kaisha,[4] another Japanese corporation, or to their American branches, vested in the Custodian. These vesting orders were served on Lavino on August 7, 1946.

On September 12, 1946 the Custodian issued a turnover directive to Lavino, directing it to pay $25,000 to the Custodian, this sum, as we have said, being the balance due Kawasaki for transportation of freight. The order was served on Lavino on October 15, 1946. Upon Lavino's refusal to comply with the directive, the Custodian filed a petition

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[4] The relation of this Japanese corporation to Kawasaki Kisen Kaisha Ltd. does not appear from the record. No question concerning the status of the second Japanese corporation is raised by the parties.

in the court below, pursuant to Section 17 [5] of the Trading with the Enemy Act, 50 U. S. C. A. Appendix Section 17, in which he prayed that an order be entered requiring Lavino to " . . . deliver $25,000 with interest thereon from September 5, 1942 to the petitioner . . .". In its answer Lavino set forth its claim of set-off claiming damages by reason of alleged prior breach of contract but admitted that $241 was due Kawasaki. This amount is the difference between the $25,000 retained by Lavino and its claimed damages of $24,759. Lavino asserted that it stood ready and willing to turn over the $241 to the Custodian.

The court below entered judgment for the Custodian for $25,000 and interest from September 5, 1942. Lavino then moved to vacate the judgment, contending that the Custodian was not entitled to interest. The court vacated the order, and, after a rehearing on the sole question of interest, entered judgment directing that the ". . . respondent [Lavino] forthwith turn over and deliver to the petitioner [the Custodian] the sum of $25,000", interest being omitted from the judgment.

The Custodian has appealed, contending (1) that he is entitled to interest at a reasonable rate on the amount of $25,000 from October 15, 1946 (the date of the service of the turnover directive) to the date of Lavino's compliance therewith, and (2) that he

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[5] Section 17 provides as follows:

"The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court . . ."

is entitled to interest at 6% on the sum of $25,000 from July 1, 1941 (the date Lavino became indebted for transportation to Kawasaki) until October 15, 1946 (the date of service of the turnover directive).[6] Contention (2), *supra*, is based on the law of Pennsylvania which provides that interest at 6% accumulates on indebtedness from the date the debt should have been paid. Lavino for its part contends that the suit is possessory in character; that its purpose is to compel the transfer of a debt, and that under the Act the court below had no authority to do more than to direct the transfer to the Custodian of an amount of money equivalent to the debt. It follows, says Lavino, that the Custodian is not entitled to interest as a matter of law, citing Clark v. Manufacturers Trust Company, 2 Cir., 169 F. 2d 932, 936, cert. den. 335 U. S. 910.

The narrow question presented by the instant appeal is whether the Custodian is entitled to interest, and, if so, from what beginning date. The Act makes no provision for payment of interest where, as here, there is noncompliance with the Custodian's demand that enemy property be turned over to him.[7] In Clark v. Manufacturers Trust Co., *supra*, under circumstances analogous to those at bar the Court of Appeals for the Second Circuit

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[6] The Custodian contends that under Rule 54 (c) of the Rules of Civil Procedure the court below should have granted him the relief to which he was entitled even though he demanded interest on the $25,000 only from September 5, 1942.

[7] See, however, Section 16 of the Act, 50 U. S. C. A. Appendix, Section 16, which provides that "Whoever shall wilfully . . . refuse to comply with any order of the President issued in compliance with the provisions of this act, shall, upon conviction be fined not more than $10,000, or, if a natural person, be imprisoned for not more than ten years, or both." In this connection see Stoehr v. Wallace, 255 U. S. 239, 245.

held, one judge dissenting, that there is ". . . no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment." We cannot agree. Although Congress did not deal with interest in the Act the absence of an express provision respecting it does not preclude its award.

In Board of Comm'rs v. United States, 308 U. S. 343, 349, 350, where, as in the instant case, the question was the right of the United States to collect interest prior to judgment in a suit to recover taxes wrongfully collected from an Indian ward of the United States by a county of the State of Kansas, the Supreme Court, speaking through Mr. Justice Frankfurter, pointed out that, "The issue is uncontrolled by any formal expression of the will of Congress," and said, "In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim ultimately derived from federal law, this implying a wish of Congress to collect what is deemed fairly owing according to traditional notions of Anglo-American law, the Court has chosen that rule as to interest which comports best with general notions of equity. United States v. Sandborn, 135 U. S. 271, 281. Billings v. United States, 232 U. S. 261. Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law making." Compare also Rodgers v. United States, 332 U. S. 371, 373; Royal Indemnity Co. v. United States, 313 U. S. 289, 295-6. The Act creates the obligation to turn over on demand the property of the alien, not only to keep such property from being used for

the benefit of the enemy but also to "affirmatively compel the use and application of foreign property" in "the interest of and for the benefit of the United States." See H. R. Rep. No. 1507, 77th Cong., 1st Sess. pp. 2-3; 55 Stat. 839, 50 U. S. C. App. 5 (b) (1).

When the Custodian served his turnover directive upon Lavino the latter had an immediate duty to comply. The statute requires an immediate transfer of the property to the Custodian without resort to the courts by the holders of the property. On surrender of the property Lavino could have at once filed suit under Section 9 of the Act, 50 U. S. C. A. Appendix, Section 9, and in that proceeding could have litigated fully and adequately its claim of set-off. See Stoehr v. Wallace, 255 U. S. 239, 245-6, and Central Trust Co. v. Garvan, 254 U. S. 554, 566-8. As was said in the Garvan case, "The occasion of the duty is a demand after determination by the President and it is hard to give such meaning to the words 'which the President after investigation shall determine is so . . . held' unless the determination and demand call the duty into being." Lavino, in disregard of that legal duty, refused to comply with the turnover directive, retaining the sum of $25,000, though Congress had created a remedy adequate for its relief in Section 9 of the Act. Lavino had the use of the money during the period of retention.

We conclude that the United States is entitled to interest from the date of service of the demand, *viz.*, October 15, 1946, to the date of the judgment

of the court below.[8] To hold otherwise would place a premium upon disobedience to the mandate of the statute and reward the recalcitrant. See the cases cited, *supra,* and the brief dissent of Judge Clark in the Manufacturers Trust Co. case, *supra.*

We cannot agree with the contention of the Custodian that the law of Pennsylvania has any application here. We are adjudicating a federal question arising under an Act of Congress, and, in the absence of an applicable federal statute, it is for the federal court to award, according to its own criteria, appropriate damages expressed in terms of interest. Compare Royal Indemnity Co. v. United States, *supra,* 313 U. S. at p. 296. As the duty to transfer the property arises only on demand by the Custodian, such a demand, followed by non-compliance, constitutes the condition precedent necessary to accrual of interest on the debt for the benefit of the Custodian. But there is no statute and no acceptable legal theory which would award interest prior to the Custodian's demand. Indeed to award the Custodian interest on the sum demanded prior to the date of the turnover directive would penalize the debtor for delays by the Custodian wholly beyond the debtor's control. To impose such a burden on the debtor would not be just.

The judgment of the court below will be reversed with the direction to award interest on the sum of $25,000 from the date of service of the turnover directive, *viz.,* October 15, 1946 to the date of judg-

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[8] Interest on the judgment is not in issue here.

ment in the court below. Interest on the judgment when modified should of course follow the usual rule.

A true Copy: Teste.

____ ____,

Clerk of the United States
Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948.~~ 47

No. ~~443~~ . 15

MANUFACTURERS TRUST COMPANY,
Petitioner,

v.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

LEONARD G. BISCO,
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THE COURT PRESS, N. Y. C.

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OCTOBER TERM, 1948.

No.

MANUFACTURERS TRUST COMPANY,

Petitioner,

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TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered on the 5th day of August, 1948, affirming in part an order of the District Court of the United States for the Southern District of New York entered on December 12, 1947.

Opinion Below.

The opinion of the Court below was filed on the 5th day of August, 1948 (R. 29) and is reported in 169 Fed. 2d 922. The District Court of the Southern District of New York rendered no opinion.

Basis of Jurisdiction.

Jurisdiction is invoked under Sections 347, 349A and 350 of Title 28 of the United States Code.

The judgment of the Court of Appeals for the Second Circuit was entered on August 5, 1948. Application for extension of time to file an application for a writ of certiorari was made by petitioner to this Court and an order extending petitioner's time to file the application for a writ of certiorari until December 3, 1948 was entered on November 5, 1948.

Questions Presented.

The fundamental question presented in this petition is whether the Alien Property Custodian may vest the amount of the deposit balance standing to the credit of an enemy notwithstanding the assertion by the bank that due to its banker's right of setoff of a past due indebtedness it is not indebted to the enemy in any amount.

A corollary to this question is whether a bank's right of setoff is a matter of substantive right or a remedial right.

A further corollary to this question is whether in the face of the claimed setoff the Custodian may settle the accounts between the enemy depositor and the bank, determine that the bank is indebted to the enemy in a sum certain without any offset or counterclaim and vest the debt thus created and determined.

A further question presented is whether the bank's right to hold and apply the Reichsbank's deposit balance is a right in the nature of a security interest in property within the purview of Section 8(a) of the Trading with the Enemy Act.

Statutes Involved.

Sec. 5(b) (as amended by Title III War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 838, 50 U. S. C. App., Supp. V, 5(b)); Sec. 7, 40 Stat. 416 (as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020); Sec. 8(a), c. 106, Sec. 8, 40 Stat. 418; Sec. 9(a) as amended by the Act of March 4, 1925, c. 285, Sec. 1, 42 Stat. 1511; Sec. 17, c. 106, Sec. 17, 40 Stat. 425 of the Trading with the Enemy Act as amended, 50 U. S. C. App. 1-31.

Executive Order No. 9193 (7 F. R. 1971), as amended by Executive Order No. 9567 June 8, 1945 (10 F. R. 6917).

Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981).

Statement.

The material facts are contained in the opinion of Swan, *J.* (R. 30).

On February 1, 1946 the Alien Property Custodian, hereinafter referred to as "Custodian", issued Vesting Order 5791 which described the property thereby vested as "that certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same". The vesting order made no determination as to the amount of the debt owing by the Manufacturers Trust Company, hereinafter referred to as "the Bank", to the Reichsbank.

At the time of the issuance of the vesting order the sum of $25,581.49 stood to the credit of the Reichsbank's deposit account on the Bank's books. On the same date, and prior to the date of the vesting order, the Reichsbank was indebted to the Bank in excess of the aforesaid deposit balance as guarantor of past due obligations of various German banks. After receipt of the vesting order the Bank advised the Custodian that in view of the Reichsbank's indebtedness to it in excess of the deposit balance there was no balance available to the Reichsbank.

Thereafter, the Attorney General, as successor to the Custodian, issued a turnover directive wherein he determined that at the time of the issuance of Vesting Order 5791 the Bank owed the Reichsbank $25,581.49 and that there are no valid offsets or counterclaims to the said sum. Upon the Bank's refusal to make payment of the $25,581.49 the Attorney General instituted summary proceedings under Section 17 of the Trading with the Enemy Act to compel payment of said sum.

In the District Court petitioner contended that an order should not be made directing it to pay a debt found by the Custodian to be due to the Reichsbank upon the ground that it was not indebted to the Reichsbank in any sum at the time of the issuance of the vesting order and that the Custodian did not have the power to determine the existence and amount of the debt and to summarily compel payment thereof.

The District Court made an order directing the Bank to pay the said sum with interest from the date of the service of the turnover directive, from which order an appeal was taken to the United States Court of Appeals for the Second Circuit.

On the appeal to the United States Court of Ap-

peals for the Second Circuit petitioner contended that the Custodian has no power to compel payment of a disputed debt upon his *ex parte* determination as to the existence and amount thereof; that the validity and extent of the Bank's setoff may not be summarily determined in a proceeding under Section 17 of the Trading with the Enemy Act; and that the Court may not compel payment of the alleged debt until the existence and amount thereof is established by the Custodian in an independent proceeding.

The United States Court of Appeals for the Second Circuit affirmed so much of the order as directed the Bank to pay $25,581.49 and modified so much of the order of the District Court as directed the payment of interest. The affirmance was based upon a holding that the Bank's assertion that it is not indebted to the Reichsbank because the Reichsbank was indebted to it in excess of the amount of the deposit balance as a guarantor of a past due obligation, was not a denial of an indebtedness but the assertion of a cross-claim which should be litigated in a proceeding instituted under Section 9 of the Trading with the Enemy Act.

Reasons for Granting Petition.

As the Court of Appeals pointed out, there is very little authority on the question of the power of the Custodian to vest a disputed debt and to compel its payment by a putative debtor. That question has not been decided by this Court.

On the aspect of the opinion dealing with the right of a bank to set off its depositor's balance against depositor's unmatured obligation, the Court of Appeals departed from well accepted commercial usage and modern legal principles.

Both questions are of great importance to the commercial community and banks throughout the United States and have already evoked considerable inquiry and interest.

The vesting of a debt is, in effect, a garnishment of the putative debtor's property for the satisfaction of a debt allegedly due to an enemy. The Custodian's power under the Trading with the Enemy Act to vest debts is confined to debts whose validity and extent the debtor acknowledges. Whereas the Custodian may seize a chattel which he determines is held for an enemy, he may not lawfully seize property for the satisfaction of a disputed debt without first establishing the existence of the debt in a separate proceeding. *Simon* v. *Miller*, 298 Fed. 520.

In the majority opinion of the Circuit Court it is stated that the said Court would hesitate to hold that if the existence of a debt is denied by a putative debtor, the Custodian has the power to determine that there is a debt and the amount thereof and that such a determination is conclusive in a proceeding under Section 17 of the Trading with the Enemy Act (R. 32). In view of this holding the affirmance of the District Court's order directing the petitioner to pay $25,581.49 to the Custodian cannot be based on the findings as to the existence and amount of the debt contained in the turnover directive but upon the Bank's admission that it is indebted to the Reichsbank in the sum of $25,581.49 for the deposit balance. However, when the said statement was made by the Bank, the Bank also stated that the said balance is unavailable to the Reichsbank because the Reichsbank was indebted to the Bank on a past due obligation in a sum exceeding said balance.

The crucial phrase in the majority opinion of the

Court of Appeals in so far as the present controversy is concerned is that "a setoff at law is a money demand independent of and unconnected with the plaintiff's cause of action", that the "assertion by the Bank of a right of setoff is not a denial of the Reichsbank's claim for the amount on deposit", and that the Bank "must have recourse to Paragraph 9 to litigate its asserted setoff" (R. 32).

The decision of the Court of Appeals is in conflict with the modern, long recognized and established principle that a bank may at will at any time apply a deposit balance due from the bank to the depositor in payment of a past due obligation of a depositor.

A deposit in a bank creates a debtor and creditor relationship between the bank and the depositor and the bank may apply the deposit balance upon any obligation due it from the depositor. *Studley* v. *Boylston Nat. Bank of Boston*, 229 U. S. 523; *Strauss, et al.* v. *The Tradesmen's National Bank of New York*, 122 N. Y. 379, 382; *Falkland* v. *St. Nicholas Nat. Bank of N. Y.*, 84 N. Y. 145, 149.

The bank's right to apply the deposit balance in payment of a depositor's matured obligation arises from the contract implied from relationship of the parties and by operation of law (*Falkland* v. *St. Nicholas National Bank of New York*, 84 N. Y. 145), which stands upon the footing of a legal contract. *Poindexter* v. *Greenhow*, 114 U. S. 270, 300.

The New York courts have held that a bank may set off a deposit balance against a matured obligation for which the depositor is liable as a guarantor. *New York Title & Mortgage Co.* v. *Irving Trust Co.*, 241 App. Div. 246, aff'd 268 N. Y. 547; *Smith* v. *Eighth*

Ward Bank, 31 App. Div. 6; *Van Schaick* v. *Pennsylvania Exchange Bank*, 236 App. Div. 453.

According to the modern view this right is a matter of substantive right and not of procedure. *First National Bank of Indianola* v. *Malone*, 76 Fed. 2d 251; *The Gloria*, 286 Fed. 188, 192; *Wisdom* v. *Guess Dry-cleaning Co.*, 5 Fed. Supp. 762.

The bank's right of setoff is not limited in its exercise to the pleading of a counterclaim in an action but is enforceable by the bank's own act without the aid of a court. *Studley* v. *Boylston Nat. Bank of Boston*, 229 U. S. 523; *Gonsalves* v. *Bank of America National Trust and Savings Association*, 16 Cal. 2d 169, 105 P. 2d 118; *Jefferson County National Bank* v. *Dusekas*, 166 Misc. 720.

The practical effect of a setoff arising from the existence of mutual demands is the satisfaction of the cross demands leaving only whatever balance may be due on either as the true amount of the indebtedness from the one party to the other. *Bank of Marysville* v. *Marysville Windisch Mulhauser Brewing Co.*, 50 Ohio State 151, 33 N. E. 1054; *Long Beach Trust Co.* v. *Warshaw*, 264 N. Y. 331; *Commercial Bank of Albany* v. *Hughes*, 17 Wendel 94; *Ware, as Administrator* v. *Howley*, 68 Ia. 63, 27 N. W. 788, 789.

The effect of the setoff is to decrease the bank's obligation to the depositor. If the depositor is, in fact, indebted to the bank, the bank may exercise its right of setoff; that the transaction is not on the books of the bank or that an official of the bank does not know of its existence is immaterial on the issue of

the indebtedness. *Walser* v. *International Union Bank*, 21 Fed. 2d 294, 296.

The Court of Appeals notwithstanding, the Bank did not admit any liability to the Reichsbank. While it admitted that as a result of deposits made a balance in the sum of $25,581.49 stood to the credit of Reichsbank, it also stated in no uncertain terms that there was no debt due from it to the Reichsbank because of the Reichsbank's indebtedness to it in an even greater amount.

The District Court had no power to direct payment of the disputed debt and the affirmance of that part of the order by the Court of Appeals for the Second Circuit was erroneous. If the existence of an indebtedness is denied, the putative debtor cannot be compelled to pay the debts determined to be owing by the Custodian before the existence and the amount of such debt is judicially determined in a separate proceeding.

Section 8(a) of the Trading with the Enemy Act protects the right of a person having a right in the nature of security in property of an enemy. The bank's right to withhold the deposit balance and to apply it against any matured indebtedness owing to it by its depositor has been classified in many cases, including decisions of this Court, as a lien for the security and protection of the bank. *Falkland* v. *St. Nicholas National Bank of New York*, 84 N. Y. 145, 149; *Studley* v. *Boylston Nat. Bank of Boston*, 229 U. S. 523, 528.

The Custodian can have no greater right than the enemy depositor to demand repayment of a deposit balance allegedly due to a depositor and to enforce payment thereof. If the balance was unavailable to

the Reichsbank upon demand, it was likewise unavailable to the Custodian.

The Courts have at all times been solicitous to protect a bank's right to hold and apply the deposit balance. In no other proceeding has a bank been compelled to pay a deposit balance and to litigate its right to setoff thereafter. The decision of the Court below is contrary to the modern view of the bank's right of setoff as understood by the commercial community and by the Court.

CONCLUSION.

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

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INDEX

CITATIONS

818760—49

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 443

MANUFACTURERS TRUST COMPANY, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (R. 29) is reported at 169 F. 2d 932. The District Court wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals was rendered August 5, 1948 (R. 35). On November 5, 1948, the time within which a petition for a writ of certiorari might be filed was extended by Mr. Justice Jackson to December 3, 1948, "providing the statutory time has not already expired" (R. 37). The petition for a writ of certiorari was filed on December 2, 1948. The

jurisdiction of this Court is founded upon Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari was filed within the time permitted by statute.

2. Whether a bank, asserting a claim against an enemy depositor, may raise such claim as a defense to a suit under Section 17 of the Trading With the Enemy Act, in which the Alien Property Custodian seeks to enforce his demand for possession of a sum determined by him to be owing to the enemy depositor by the bank.

STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 11–17.

STATEMENT

On February 1, 1946, the Custodian,[1] having determined that the Deutsche Reichsbank was a national of an enemy country and that "that certain debt or other obligation owing to Deutsche Reichs-

[1] By Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this memorandum the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

bank, by Manufacturers Trust Company" was "property within the United States * * * payable or deliverable to" the Reichsbank, vested such property in himself (Vesting Order No. 5791, February 1, 1946, 11 F. R. 3005; Exhibit B to Petition, R. 11, 12). On January 30, 1947, the Custodian served a turnover directive on the Manufacturers Trust Company (hereinafter sometimes referred to as "the Bank"). In that directive he determined that at the time this vesting order was issued the Bank owed the Deutsche Reichsbank $25,581.49 and that the sum of $25,581.49 was property in the control of the Bank which had been vested in the Custodian, and directed that this sum be forthwith turned over to him (Exhibit D to Petition, R. 14–16).

The Bank refused to comply, and on October 29, 1947, the Custodian instituted the instant proceeding, petitioning the District Court for the Southern District of New York for an order directing compliance (R. 4). The answer of the Bank was in substance a plea that the Deutsche Reichsbank had no credit balance as of the date of the vesting order, because the Reichsbank was "an instrumentality and part of the German Government" and the German Government in turn had guaranteed payment of the debts of various German banks to the Manufacturers Trust Company, which debts in the aggregate exceeded the

amount owed by the Bank to the Reichsbank (R. 19, 21).

The District Court ordered the Bank to pay the sum demanded plus interest at six percent from the date of service of the turnover directive (R. 23). The Court of Appeals modified the order by striking the award of interest and affirmed the order as so modified (R. 29–36). The Custodian has filed a petition for certiorari to review the interest question. *Clark* v. *Manufacturers Trust Co.*, No. 386, this Term.

DISCUSSION

1. Mr. Justice Jackson's order of November 5, 1948 (R. 37), extending to December 3, 1948, the petitioner's time in which to file a petition for certiorari, was entered more than ninety days, but less than three months, after the entry of judgment in the Court of Appeals. The extension was expressly conditioned on the proviso that the statutory time had not already expired. Section 350 of Title 28 of the United States Code formerly required that a petition for writ of certiorari to this Court be filed within three months from the date of entry of the final judgment of the court below. Section 2101 (c) of the new Judicial Code, enacted on June 25, 1948, with an effective date of September 1, 1948, altered the time period for filing such a petition to ninety days. Consequently, the question arises whether the applicable time period is that in effect at

the date of the final judgment (three months), or that in effect at the date of the entry of the extension order (ninety days).

So far as we are aware, this Court has not yet expressly passed on this question. Although in *Wixman* v. *United States*, No. 263, this Term, the Court granted a petition for writ of certiorari which was filed more than ninety days, but less than three months, after the entry of the final order below, the point was not raised. In *Mulcahy* v. *New York, N. H. & H. R. R.*, No. 376, this Term, respondents argued that the petition should be dismissed because filed after the expiration of ninety days, although within three months, after the judgment below. The Court denied certiorari, however, without indicating whether it regarded the petition as out of time.

II. In upholding the Custodian's right to an order directing immediate payment of the sum demanded in the turnover directive, the Court of Appeals stated that:

> Technically, a set-off at law is a money demand independent of and unconnected with the plaintiff's cause of action. *Otto* v. *Lincoln Savings Bank*, 268 App. Div. 400, 402, aff'd 294 N. Y. 798. Hence the assertion by the Bank of a right of set-off is not a denial of the Reichsbank's claim for the amount of its deposit. Consequently, we believe that, in harmony with the principle that an admitted debt owed to an enemy

> must be paid over, the Custodian was entitled to recovery * * *. (R. 32.)

We do not believe that this ground of decision presents any question which warrants review by this Court. It is merely a determination of the nature of a bank's right of set-off at common law; moreover, the decision was carefully limited to the effect to be given such a right when it is asserted as a defense to a possessory suit by the Alien Property Custodian under the Trading With the Enemy Act (R. 32). Insofar as the decision involves a question of New York law, the petitioner has shown no sufficient reason for this Court to review a decision of local law by judges presumed to be familiar with that law.[2] Insofar as the decision involves the construction of Section 17 of the Trading With the Enemy Act, there is no conflict, and there is no occasion for further review.

III. The Government, however, argued in the Court of Appeals a broader ground, which the court did not adopt. The Government's argu-

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[2] The petitioner also contends that it had a possessory lien, within the scope of Section 8 (a) of the Act (40 Stat. 418, 50 U. S. C. App., § 8 (a)), on the credit balance of its depositor, the Reichsbank (R. 33). It is unnecessary to consider the effect of such a lien, had one existed, for the Court's holding that "the right of set-off is not technically a lien, and certainly not a lien in property of an enemy," (R. 33) is amply supported by the authorities cited in the opinion and plainly does not warrant further review.

ment was based on the unambiguous language of Section 7 (c) of the Act (40 Stat. 416, as amended, 40 Stat. 1020, 50 U. S. C. App. § 7 (c)), which provides in pertinent part that: "If the President shall so require any money * * * owing * * * to * * * an enemy * * * which the President * * * shall determine is so owing * * * shall be * * * paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * *."

The effect of this provision in such a situation as that here presented has never specifically been determined by this Court, although several of its decisions emphasize the fundamental proposition, which we believe should be controlling in the instant case, that "for the purposes of immediate possession the determination of the Enemy Property Custodian is conclusive, whether right or wrong," so that his suit to enforce a demand for possession of property which he determines to be owned by or owing to an enemy is intended to be equivalent to a "taking with the strong hand." E. g., *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566, 568–9; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469. These cases involved property which the Custodian determined to be owned by, rather than owed to, enemies, but nothing in the language or legislative history of the Act, or in common sense, justifies an inference that Congress intended to

distinguish between the two types of property. Opinions of the lower federal courts on the precise point are not however, entirely consistent. Compare the holdings in *Camp* v. *Miller*, 286 Fed. 525 (C. A. 5) and *Clark* v. *E. J. Lavino & Co.*, 72 F. Supp. 497 (E. D. Pa.) with the dicta in the instant case (R. 31, 32) and in *Simon* v. *Miller*, 298 Fed. 520 (S. D. N. Y.).

This broader question, namely, whether debts stand on a different footing from other types of property owned by the alien enemy, is one of great importance in the administration of the Trading With the Enemy Act. The Court of Appeals said, *obiter dictum*, that: "If the putative debtor denies the existence of any debt whatever, we should hesitate to hold that the Custodian's power extends so far as to make his *ex parte* determination that there is a debt and the amount of it conclusive in a proceeding under § 17" (R. 32).

The vesting of debts owed to enemies is an important aspect of the Custodian's program for the vesting of enemy property, and bank deposits constitute a very numerous and important class of such debts. See *Annual Report, Office of Alien Property, Fiscal Year Ending June 30, 1947*, p. 76. The power summarily to reduce such assets to possession is as important to the efficient administration of the Act as the power summarily

to reduce to possession property found to be owned by an enemy, and is no more likely to be abused. The decision below, to the extent that it may cast doubt on the Custodian's summary powers, will hamper him in the exercise of his statutory functions. Persons owing money to an enemy, who desire to retain as long as possible the possession and use of the sum in question, may, in reliance on the decision below, devise colorable grounds upon which to dispute the correctness of the Custodian's administrative determination and deny the existence of the debt. As was said by Judge Learned Hand in *Kahn* v. *Garvan*, 263 Fed. 909, 916 (S. D. N. Y.), "To entangle this power in incidental litigations would be substantially to deny its value, which depends upon its speedy and absolute exercise * * *"

The Government accordingly believes that, should this Court grant the Government's petition for a writ of certiorari to review the refusal of the Court of Appeals to allow interest in the instant case (*Clark* v. *Manufacturers Trust Co.*, No. 386, this Term), it would be appropriate at the same time for this Court to review the broad question of the Custodian's power, under Section 7 (c) of the Trading With the Enemy Act, to require payment to himself of a sum which he determines to be owing to an enemy, leaving the

putative debtor, if he denies the indebtedness, to the remedy provided by Section 9 (a) of the Act.[2]

CONCLUSION

If the Court should grant the Government's petition for a writ of certiorari in No. 386, the Government would not object to the granting of the present petition also, if timely, for the purpose of reviewing the broad question of the Custodian's power to obtain summary possession of a debt which he has determined to be owing to an enemy. Otherwise, this petition should be denied.

Respectfully submitted,

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JANUARY 1949.

[2] The Court of Appeals said, by way of dictum, that "the Bank must have recourse to § 9 to litigate its asserted right of set-off." (R. 32.) This dictum is difficult to reconcile with the ground of decision adopted by the court, for, if the set-off (assuming it to exist) is "a money demand independent of and unconnected with" (R. 32) the Reichsbank's claim for the amount of its deposit, petitioner would appear to be simply an unsecured creditor of the Reichsbank, in which case its sole remedy against the Custodian would be that provided by Section 34 of the Trading With the Enemy Act, 60 Stat. 925, 50 U. S. C. App., § 34.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

> SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839]:
>
> * * * * *
>
> (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the

terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020]:

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * *

* * * * *

SEC. 8. (a) [40 Stat. 418] Any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage,

pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

SEC. 9. (a) [as amended by the Act of March 4, 1925, c. 285, Sec. 1, 42 Stat. 1511] Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right,

title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

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SEC. 17. [40 Stat. 425] The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary"

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SEC. 34. (i) [as added by 60 Stat. 925] The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided,* That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed

to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.